91-1973

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

MICHAEL K. TOPALIAN, WARREN B. FIENGA, ROY JACOBS, JR., RICHARD OROZCO, JUAN GARCIA-QUIROGA, JEAN STEUBING, CHARLES W. ANDERSON, FRANCIS D. COVERT, RICHARD H. MANUEL, JACK E. BURROUGHS, DON W. BOYETT, BOBBY W. McDONALD, CHARLES F. LACELLE, RICHARD D. MIKLES AND MJM VENTURES,

Petitioners,

v.

JOHN N. EHRMAN, EHRMAN INVESTMENT GROUP, INC., W. RODERICK JOHNSON, W. RODERICK JOHNSON, P.C., RICHARD O'DONNELL, HOUSTON PETROLEUM CO., INC., JOEL A. MIDDLEBROOK, JOEL A. MIDDLEBROOK, CPA, VICTOR B. RUSSEK, RUSSEK CO., BERT GAMBLE, RIO BRAVO OIL CO., INC., ROCKWOOD INSURANCE CO. AND ROBERT E. ECKIS, JR.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit Panel's holding – based on no cited precedent – that disclaimers in Respondents' Confidential Offering Memorandum served to absolutely shield Respondents from all charges of securities fraud, regardless of the circumstances, is in direct conflict with the law of every Circuit, including the Fifth, as well as Supreme Court precedent.

2. Whether the Panel's holding that all Petitioners should have known about Respondents' alleged securities fraud by May 1, 1985 directly conflicts with the leading Fifth Circuit case as well as the case law of every Circuit to have considered similar cases.

3. Whether the Fifth Circuit Panel's application of summary judgment standards is in direct conflict with Fifth Circuit precedent, the precedent of other Circuits, clashes with Supreme Court case law governing summary judgments, and threatens to severely undermine the clear Congressional purpose underlying the securities laws and the RICO Statute.

4. Whether the record makes clear that Respondent **EHRMAN** and other moving parties knew that material factual disputes existed when they filed their summary judgment motions and intended to "railroad" Petitioners through an illegitimate and premature motion for summary judgment as a last ditch effort to avoid a trial they knew they could not possibly win.

5. Whether the new **Section 27A of the 1934 Securities and Exchange Act** requires, on the facts of this case, that

QUESTIONS PRESENTED – Continued

case law ante-dating this Court's decision in *Lampf v. Gilbertson*, ___ U.S. ___, 111 S.Ct. 2773, 2781-82 (1991) apply to this case.

INTERESTED PARTIES

PETITIONERS

MICHAEL K. TOPALIAN, WARREN B. FIENGA, ROY JACOBS, JR., RICHARD OROZCO, JUAN GARCIA-QUIROGA, JEAN STEUBING, CHARLES W. ANDERSON, FRANCIS D. COVERT, RICHARD H. MANUEL, JACK E. BURROUGHS, DON W. BOYETT, BOBBY W. McDONALD, CHARLES F. LACELLE, RICHARD D. MIKLES AND MJM VENTURES, A PARTNERSHIP

RESPONDENTS

JOHN N. EHRMAN, EHRMAN INVESTMENT GROUP, INC., W. RODERICK JOHNSON, W. RODERICK JOHNSON, P.C., RICHARD O'DONNELL, HOUSTON PETROLEUM CO., INC., JOEL A. MIDDLEBROOK, JOEL A. MIDDLEBROOK, CPA, VICTOR B. RUSSEK, RUSSEK CO., BERT GAMBLE, RIO BRAVO OIL CO., INC., ROCKWOOD INSURANCE CO. AND ROBERT E. ECKIS, JR.

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McDONALD, LACELLE, MIKLES AND MJM VENTURES, A PARTNERSHIP (TOPALIAN, ET AL.), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on March 6, 1992.

OPINIONS BELOW

The opinion of the Court of appeals for the Fifth Circuit is reported at 954 F.2d 1125 (5th Cir. 1992) and is reproduced as **Appendix A, pp. 1-40,** *infra*. The unpublished opinion of the District Court is reproduced at **Appendix C, pp. 44-74,** *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on March 6, 1992. See **Appendix A, pp. 1-40,** *infra*. The opinion of the Court of Appeals was corrected on April 28, 1992. See **Appendix B, pp. 41-43,** *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Constitution

The **Seventh Amendment** to the **United States Constitution** provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no

fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Preliminary Notes to **Regulation D, (Rules 501-508)** promulgated pursuant to the **1933 Securities Act, 15 U.S.C. 77a et seq.**, provides, in part:

1. The following rules relate to transactions exempted from the registration requirements of section 5 of the Securities Act of 1933 (the "Act"). Such transactions are not exempt from the antifraud, civil liability, or other provisions of the federal securities laws.

   Issuers are reminded of their obligation to provide such further material information, if any, as may be necessary to make the information required under this regulation, in light of the circumstances under which it is furnished, not misleading.

Rule 502(c) of Regulation D, 17 C.F.R. 230. 502(c) provides:

(c) *Limitation on manner of offering.* Except as provided in Rule 504(b)(1), neither the issuer nor person on its behalf shall offer or sell the securities by any form of general solicitation or general advertising, including, but not limited to, the following:

(1) Any advertisement, article, notice or other communication published in any newspaper, magazine, or similar media or broadcast over television or radio; and

(2) Any seminar or meeting whose attendees have been invited by any general solicitation or general advertising.

Rule 502(d) of Regulation D, 17 C.F.R. 230.502(d) provides:

> **(d)** ***Limitations on resale.*** Except as provided in Rule 504(b)(1), securities acquired in a transaction under Regulation D shall have the status of securities acquired in a transaction under section 4(2) of the Act and cannot be resold without registration under the Act or an exemption therefrom. The issuer shall exercise reasonable care to assure that the purchases of the securities are not underwriters within the meaning of section 2(11) of the Act, which reasonable care may be demonstrated by the following:
>
> **(1)** Reasonable inquiry to determine if the purchaser is acquiring the securities for himself or for other persons;
>
> **(2)** Written disclosure to each purchaser prior to sale that the securities have not been registered under the Act and, therefore, cannot be resold unless they are registered under the Act or unless an exemption from registration is available; and
>
> **(3)** Placement of a legend on the certificate or other document that evidences the securities stating that the securities have not been registered under the Act and setting forth or referring to the restrictions on transferability and sale of the securities.

While taking these actions will establish the requisite reasonable care, it is not the exclusive method to demonstrate such care. Other actions by the issuer may satisfy this provision. In addition, rules 502(b)(2)(vii) and 504(b)(2)(ii) require the delivery of written disclosure of the limitations on resale to investors in certain instances.

Section 10(b) of the 1934 Securities Exchange Act, 15 U.S.C. §78(j) provides:

> **Sec. 10.** It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange –
>
> **(b)** To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10b-5, promulgated pursuant to **Section 10(b)** of the **1934 Securities Exchange Act, 17 C.F.R. §240.10b-5**, provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> **(a)** To employ any device, scheme, or artifice to defraud,
>
> **(b)** To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> **(c)** To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Rule 10b-9(a) under the **1934 Securities Exchange Act of 1934, 17 C.F.R. §240.10b-9** provides:

> **(a)** It shall constitute a "manipulative or deception device or contrivance", as used in section 10(b) of the Act, for any person, directly or indirectly, in connection with the offer or sale of any security, to make any representation:
>
> > **(1)** To the effect that the security is being offered or sold on an "all-or-none" basis, unless the security is part of an offering or distribution being made on the condition that all or a specified amount of the consideration paid for such security will be promptly refunded to the purchaser unless **(i)** all of the securities being offered are sold at a specified price within a specified time, and **(ii)** the total amount due to the seller is received by him by a specified date; or
> >
> > **(2)** To the effect that the security is being offered or sold on any other basis whereby all or part of the consideration paid for any such security will be refunded to the purchaser if all or some of the securities are not sold, unless the security is part of an offering or distribution being made on the condition that all or a specified part of the consideration paid for such security will be promptly refunded to the purchaser unless **(i)** a specified number of units of the security are sold at a specified price within a specified time, and **(ii)** the total amount due to the seller is received by him by a specified date.

Section 29(b) of the **1934 Securities Exchange Act, 15 U.S.C. §78cc(b)**, provides in part:

> **(b)** Every contract made in violation of any provision of this title or of any rule or regulation

thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this title or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule or regulation, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule, or regulation.

The Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. 1964(c) provides:

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustained and the cost of the suit, including a reasonable attorney's fee.

Rule 56(c), Federal Rules of Civil Procedure, provides:

(c) **Motion and Proceeding Thereon.** The motion shall be served at least **10 days before the time fixed for the hearing.** The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may

be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. (Emphasis ours)

STATEMENT

A. Overview and Summary

In this securities fraud and **RICO** case, Respondent-Defendant **JOHN N. EHRMAN (EHRMAN)** and others filed motions for summary judgment ostensibly in order to comply with the district court's scheduling order which imposed a June 15, 1989 motion cut-off date **(App. C, p. 44)**. On July 28, 1989, without the 10-day notice of hearing required by **Rule 56(c), F.R.C.P.**, the court heard summary judgment motions filed by some, but not all, Respondents at a hearing scheduled to discuss discovery problems **(App. H, pp. 89-90)**. Thereafter, at the request of the district court, Respondents **filed** a Pre-Trial Order which, ***inter alia,*** listed **28** issues of contested material facts **(App. E, pp. 77-80)**. Petitioners also filed a Pre-Trial Order which, ***inter alia,*** listed **48** witnesses, 24 of whom were prepared to testify on personal experience as to all phases of their claim that they were defrauded by Respondent **EHRMAN** and others. **(App. A, p. 23)**.

At the time Respondent **EHRMAN** filed his summary judgment motion, he was aware that he was under an intense Securities and Exchange Commission (SEC) investigation based on evidence of record in this case provided by Petitioners. The SEC filed suit against Respondents **EHRMAN** and **GIDEON CHERN** approximately one year later and ultimately obtained permanent injunctive

relief, appointment of a receiver, and an order of restitution for the benefit of Petitioners and other investors on the identical issues involved in this case.

On October 4, 1989, the district court granted all of Respondents' motions for summary judgment **(App. C, pp. 44-74)**, with the exception of the **RUSSEK** Defendants, whose motion the court invited and then granted on December 21, 1989. **(App. D, pp. 75-76).**

The Fifth Circuit Panel held that the statute of limitations commenced to run on November 30, 1984, **"when investors signed subscription agreements."** The lower court held that the subscription agreements signed on that date should have put the investors on notice of the speculative nature of their investment. The investors were put on notice of the risk in the investment but the signing of the agreement did not put them on notice of the fraud that was being and would continue to be perpetrated against them. By Respondents' own admissions, at least five (5) Petitioners did not sign a subscription until after January 10, 1985 **(App. F, p. 82).**

The lower courts also stated that the signing of the subscription agreements constituted investor purchases. Pursuant to the Offering Memorandum, the purchase of the units was to be consummated only if and when the partnership funded. In this case, the partnership funded in late February, 1985 **(App. F, p. 84).** The district court, in its opinion, found that Plaintiffs should have known about the Defendants' alleged misrepresentations by May 1, 1985 **(App. C, pp. 54-56).** Petitioners, who hail from different states, filed their lawsuit on December 3, 1987, seven months after they discovered that they had probably been victims of a ponzi scheme.

The district court was aware at all relevant times prior to entering summary judgment: **1)** that Respondent

EHRMAN had not been deposed although Petitioners had attempted to do so on more than six occasions; 2) that Respondent **VICTOR B. RUSSEK's** attorney thought it extraordinary that Respondents were filing summary judgment motions when the principal alleged wrongdoer – **EHRMAN** – had not been deposed; and 3) that other Respondents such as **RIO BRAVO OIL COMPANY, INC.** had candidly admitted that discovery was not completed. However, the district court was willing to proceed since Respondents "were willing to stand on the present posture of the case."

The following are quotes taken from the transcript of the July 28, 1989 Hearing. All statements quoted were made in open court in the absence of Petitioners and their attorney, who were under the mistaken belief that the Hearing was to commence at 10:30 that morning **(App. H, pp. 89-90).**

Transcript, page 3 . . .

THE COURT: **I'M MOST CONCERNED WITH THE FACT THAT THESE DEPOSITIONS NEVER SEEM TO GET COMPLETED, AND THAT THERE IS A CONSTANT RESETTING OF THESE DEPOSITIONS . . . (LINES 16-18)**

LET ME ASK MR. LOPEZ, IF YOU WILL, TO GIVE ME A REPORT ON WHERE YOU THINK YOU STAND WITH MAKING YOUR CASE; WHAT DISCOVERY REMAINS TO BE DONE, AND WHAT THE SCHEDULE IS FOR THAT DISCOVERY AS FAR AS YOU'RE CONCERNED. (LINES 23-25; PAGE 4, LINE 1)

Transcript, page 4 . . .

MR. SCHUELER: YOUR HONOR, MR. LOPEZ IS NOT HERE NOR ANY OF THE PLAINTIFFS. (LINES 2-3)

THE COURT: JOYCE, GO GIVE MR. LOPEZ' OFFICE A CALL AND SEE WHERE HE IS. IN THE MEANTIME, THEN START WITH MR. PINEDO. KNOW WHAT SOME OF THE PROBLEMS ARE, FRANK? WHY DON'T YOU JUST SPELL THEM OUT FOR ME?[1] (LINES 13-17)

THE COURT: DO YOU FEEL YOU REALLY HAVE TO HAVE TO COMPLETE YOUR DEFENSE AND ANY OTHER CLAIMS? (LINE 25; PAGE 5, LINE 1)

Transcript, page 5 . . .

MR. F. PINEDO: WELL, YOUR HONOR, WE ARE PREPARED TO GO FORWARD WITH THE CASE AS IT IS RIGHT NOW. WE DO NOT WANT DISCOVERY REOPENED. IF THE COURT FEELS THAT IT'S NECESSARY IN THE INTEREST OF ALL THE PARTIES, WE DO HAVE SEVERAL DEFENDANTS THAT WE WANT TO DEPOSE. BUT WE WOULD RATHER PROCEED, YOUR

---

[1] Frank Pinedo is attorney of record for the EHRMAN Defendants and was "securities" counsel for the Onshore partnership. He was sued by Appellants in their Second Amended Complaint. The court, in an in chambers hearing, proclaimed to all counsel of record that he at one time "worked for Frank." Subsequent to that hearing, the court struck Plaintiffs' amended complaint and later denied Appellants' motion to disqualify Mr. Pinedo.

HONOR, WITHOUT ANY FURTHER DISCOVERY. (LINES 2-8)

MR. SCHUELER: I'D SORT OF LIKE TO GO THROUGH A SUMMARY OF SOME OF THESE THINGS, IF IT IS POSSIBLE, BUT I'M RELUCTANT TO DO IT WITHOUT MR. LOPEZ HERE. (LINES 21-23)

Transcript, page 8 . . .

THE COURT: I ASSUME THAT THERE ARE STILL A NUMBER OF DEPOSITIONS THAT BEGAN AND NEVER GOT COMPLETED, BUT THE DEFENDANTS ARE WILLING TO STAND ON THE PRESENT POSTURE OF THE CASE, IS THAT CORRECT?

MR. F. PINEDO: THAT'S CORRECT, YOUR HONOR. (LINE 25, PAGE 8; LINES 1-4, PAGE 9)

Transcript, page 13 . . .

MR. LEGER: MAY IT PLEASE THE COURT, YOUR HONOR. JOHN LEGER FOR MR. RUSSEK AND RUSSEK COMPANY. I JOIN ECKIS' COUNSEL IN HAVING AN OPPORTUNITY TO FILE ADDITIONAL MOTIONS IN THIS CASE. (LINES 12-15)

ORDINARILY, AS THE COURT KNOWS, YOU COMPLETE YOUR DISCOVERY AND THEN YOU PREPARE WHAT MOTIONS YOU HAVE. BASICALLY, WHAT YOU SEE IS WHAT THE FACTS ARE IN THIS

CASE. AND WE ARE HERE ALMOST 30 DAYS TO TRIAL AND THE PRINCIPAL DEFENDANT HAS NOT BEEN DEPOSED. THAT'S WORKED A HARDSHIP ON ME IN TRYING TO PREPARE THE MOTIONS AND GETTING READY FOR TRIAL BECAUSE WE HAVEN'T FINISHED THE DISCOVERY YET. (LINES 21-25; PAGE 14, LINES 1-2)

IT'S JUST THAT THE DISCOVERY HAS GOTTEN OUT OF DATE AND I WOULD LIKE TO HAVE THAT DONE . . . BEFORE WE CAN HAVE ANY CHANCE OF MAKING VALID MOTIONS AND ARGUMENTS BEFORE THE COURT ABOUT WHAT THE FACTS ARE IN THIS CASE. (LINES 13-17)

Transcript, page 15 . . .

THE COURT: CORRECT ME IF I'M WRONG. A NUMBER OF DEPOSITIONS HAVE AT LEAST PARTIALLY BEEN TAKEN, HAVEN'T THEY?

MR. LEGER: THAT'S CORRECT. . .

THE COURT: BUT MR. EHRMAN'S DEPOSITION HAS NEVER BEEN COMPLETED?

MR. LEGER: HASN'T BEEN STARTED.

THE COURT: HASN'T BEEN STARTED?

MR. F. PINEDO: IT WAS STARTED BRIEFLY, YOUR HONOR, BUT NOT COMPLETED AND POSTPONED . . . (LINES 1-9)

1. The District Court's Opinion

The district court based its grant of summary judgment on essentially two grounds – that the applicable limitations period had run and on Respondents' general denials of wrongdoing. The district court's opinion and final judgment with respect to the limitations period were entered prior to the Supreme Court's decision in *Lampf v. Gilbertson*, ___ U.S. ___, 111 S.Ct. 2773, 2781-82 (1991). In view of the recently enacted **Section 27A of the 1934 Securities and Exchange Act, 15 U.S.C. §78(aa) P.L. 102-242, December 19, 1991,** it would appear that the same pre *Lampf v. Gilbertson* case law controls this lawsuit. In granting summary judgment, the district court relied primarily on the following propositions as gleaned from its opinion:

> (1) That the disclaimers in the Offering Memorandum – *which the selling Respondents made available to Petitioners only after they had sold them the securities* – absolutely shielded the **EHRMAN** Respondents and others from any alleged oral or written misrepresentations, omissions, or other securities law violations since "an adult is responsible for reading documents he signs." **(App. C, p. 57; see also App. A, p. 14 n.15).**
>
> (2) That regardless of Petitioners' alleged lack of sophistication or their lack of suitability for the investment, and that despite Respondents' alleged fraudulent high-pressure selling tactics, concealment of fraud, and failure to make truthful disclosures, Petitioners should have known about the Respondents' alleged misrepresentations by May 1, 1985 **(App. C, pp. 54, 56)**, when some Petitioners were just receiving the purported disclosure Memorandum and approximately 4 months after Respondents sold the

securities by means of reconfirmation offers alleged to be in violation of federal law. **(App. F, p. 83).**

(3) That even though Petitioners' Civil **RICO** action was timely filed, summary judgment was appropriate **a)** since "there was no evidence of illegality" on Respondents' part **(App. C, pp. 58-59);** and **b)** since Respondents' activities were "all legitimate business practices." **(App. C, p. 58).**

(4) That Respondents were deserving of summary judgment on the **RICO** claims since Petitioners did not read the Offering Memorandum "in any depth" or lacked actual knowledge of specific wrongdoing by Respondents at the time Respondents were allegedly committing the unlawful acts in question. **(App. C, p. 61).**

(5) The Court's Memorandum assumes – without explanation – that Respondents met their initial burden of showing an absence of evidence to support Petitioners' case, citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Accordingly, its Opinion focuses solely on whether Petitioners proved their case to the same extent they would be required to during the jury trial on the merits. **(App. C, p. 52).**

(6) Finally, the Court seems to equate the circumstances of *Celotex Corp. v. Catrett* – a single issue case – with the instant case, which case presents multiple issues of contested facts as to each Plaintiff with respect to each Defendant and the relationship of the Defendants to each other. **(App. C, p. 52).**

2. The Court Of Appeals' Affirmance

The Panel decision agreed with every legal proposition set forth in the district court's opinion. **(App. A, pp.**

1-40). The Panel's amended decision took the position that **Section 27A of the Securities Exchange Act** did not resurrect Petitioners' claims. **(App. B, pp. 41-43).**

B. Statement of Background Facts

Petitioners' claims deal with *Onshore Exploration Ltd., 1984 Mid-Year Drilling Program (Onshore),* a Texas oil and gas exploration and development limited partnership. **(App. F, pp. 81-83).** Petitioner/Limited Partners are individual investors from all walks of life and from several states of the United States. Respondent **EHRMAN** and others offered units in the partnership for $30,000.00 per unit. **(App. F, p. 83).** The offering was not registered with the SEC under **Section 5 of the Securities Act of 1933, 15 U.S.C. 77e.** Instead, the Respondent General Partners represented to prospective investors that the offering was exempt from registration under the Commission's **Rule 506 of Regulation D, 17 C.F.R., 230.506,** adopted pursuant to the **Securities Act of 1933.**

It is undisputed that Respondent **EHRMAN** and others sold the units on an all-or-none basis – i.e., if the General Partners did not receive the minimum subscriptions of $2,400,000.00 for the units by December 31, 1984, they were to dissolve the partnership and reimburse the investors **(App. C, pp. 4, 5, 49).** It is also undisputed that the General Partners – Respondents **EHRMAN INVESTMENT GROUP, INC. (E.I.G.)** and **W. RODERICK JOHNSON (JOHNSON)** – did not receive the minimum subscriptions by the termination date and, thus, were required to dissolve Onshore and refund Petitioners and the other investors. However, instead of dissolving the

partnership, Respondent **EHRMAN** and others re-offered the Securities to Petitioners in January, 1985 by use of a reconfirmation letter and attached documents indicating that the units were worth $43,682.00. It is also undisputed that Respondents did not contemporaneously supply Petitioners with any disclosure materials required by law when they re-offered the Securities subsequent to the Offering's Termination Date. **(App. F, p. 83).**

Additionally, Petitioners alleged that the evidence of record indicated that the Respondent General Partners and others sold the units: **a)** through impermissible general solicitations and group seminars which Respondent **JOEL A. MIDDLEBROOK (MIDDLEBROOK)** spontaneously referred to as "dog-and-pony shows" **(App. G, p. 87); b)** to individuals on the verge of bankruptcy; c) to persons who could not afford to purchase units; and **d)** to other unsuitable or unsophisticated investors by making extravagant and fraudulent promises relative to the investment. The record also showed that Respondents created a public secondary market for the Securities by continually authorizing secondary sales of the units which resulted in the sale of Onshore Securities to some Petitioners as late as January, 1986.

It was public knowledge that Respondent **EHRMAN's** alleged wrongful conduct in Onshore and both prior and ensuing offerings embraced the same or similar purposes, results, participants, victims and methods of commission, were interrelated by distinguishing characteristics and were not merely the product of isolated events. Such conduct continued until the SEC obtained permanent injunctive relief in June 1990, corroborating

Petitioners' allegations regarding violations of the Civil RICO statute, 18 U.S.C. 1964 (c).

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT PANEL'S UNPRECEDENTED HOLDING, THAT DISCLAIMERS IN AN OFFERING MEMORANDUM SERVED TO ABSOLUTELY SHIELD RESPONDENTS FROM ALL CHARGES OF SECURITIES FRAUD REGARDLESS OF THE CIRCUMSTANCES, IS IN DIRECT CONFLICT WITH THE LAW OF EVERY CIRCUIT, INCLUDING THE FIFTH, AND IS ALSO AT ODDS WITH SUPREME COURT PRECEDENT

No federal appellate court has held, until now, that an investor is precluded from recovering under Rule 10b-5, 17 C.F.R. §240.10b-5, if the misrepresentations upon which the investor relied were oral and conflicted in some way with contemporaneous written representations available to the investor. On the contrary, determination of whether an investor's reliance is justified requires consideration of all relevant factors, including 1) the sophistication and expertise of the plaintiff in financial and security matters; 2) the existence of longstanding business or personal relationships between the plaintiff and the defendant; 3) the plaintiff's access to relevant information; 4) the existence of a fiduciary relationship owned by defendant to the plaintiff; 5) concealment of fraud by the defendant; 6) whether the plaintiff initiated the stock transaction or sought to expedite the transaction; and 8) the generality or specificity of the misrepresentations. *Bruschi v. Brown*, 876 F.2d 1526, 1529 (11th Cir. 1989); *Kennedy v. Josephthal & Co.*, 814 F.2d 798, 804 (1st Cir. 1987); *Zobrist v. Coal-X, Inc.*, 708 F.2d 1511, 1516 (10th

Cir. 1983); *G.A. Thompson & Co. v. Partridge*, 636 F.2d 945, 955 (5th Cir. 1981); *Nye v. Blyth Eastman Dillon & Co.*, 588 F.2d 1189, 1197 (8th Cir. 1978); *Straub v. Vaisman & Co.*, 540 F.2d 591, 598 (3rd Cir. 1976); *Hughes v. Dempsey-Tegeler & Co.*, 534 F.2d 156, 176-77 (9th Cir.), *cert. denied*, 429 U.S. 896 (1976). No single factor is dispositive; all must be considered in determining whether reliance was justified. *Bruschi v. Brown, supra*, 876 F.2d at 1529, *citing Zobrist v. Coal-X, Inc.*, 708 F.2d at 1516-17.

Applying the above factors to this case, it is clear that the Panel erred as a matter of law in holding that disclaimers in the Offering Memorandum absolutely shielded the **EHRMAN** Respondents and others from liability for the numerous oral and written misrepresentations made to Petitioners.

The Supreme Court has repeatedly stated that the fundamental purpose of the **1934 Act** is "to substitute a philosophy of full disclosure for the philosophy of **caveat emptor** . . . " *Santa Fe Industries v. Green*, 430 U.S. 462, 477 (1977), *citing Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151 (1972), *quoting SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 186 (1963). Moreover, the Supreme Court has made clear that the statute "must be read flexibly, not technically and restrictively" and that it "provides a cause of action for any plaintiff who suffer[s] an injury as a result of deceptive practices touching the sale [or purchase] of securities . . . " *Santa Fe Industries, supra*, 430 U.S. at 475-76, *citing Superintendent of Insurance v. Bankers Life & Gas Co.*, 404 U.S. 6, 12-13 (1971).

In *Hilgeman v. National Ins. Co. of America*, 547 F.2d 298, 302 (1977), the Fifth Circuit recognized that **Rule 10b-5**, among other things, broadly prohibits any person from employing a "device, scheme or artifice to defraud"

or from engaging in "any act, practice or course of business which operates as a fraud or deceit upon any person." *Id.* at 302, *citing* **17 C.F.R. § 240.10b-5(a)** and **(c)**. Furthermore, the Fifth Circuit in *Isquith v. Middle South Utilities, Inc.*, 847 F.2d 186, 200 n.8, 201 (5th Cir.), *cert. denied*, 109 S.Ct. 310, (1988) made clear "that how information is disclosed, as distinguished from what information is disclosed, can lead to liability under . . . **Rule 10b-5**, promulgated pursuant to **Section 10(b) of the 1934 Act.**" *Id.* at 200.

In this case, the Panel's holding conflicts with the philosophy underlying the federal securities laws and the unanimous weight of authority. If allowed to stand, the decision will encourage fraud and impede private enforcement of the federal securities laws.

II. THE PANEL'S HOLDING THAT ALL PETITIONERS SHOULD HAVE KNOWN ABOUT RESPONDENTS' ALLEGED SECURITIES FRAUD BY MAY 1, 1985 DIRECTLY CONFLICTS WITH THE LEADING FIFTH CIRCUIT CASE AS WELL AS THE CASE LAW OF EVERY CIRCUIT TO HAVE CONSIDERED SIMILAR CASES.

The district court's fixing of a date when all Petitioners knew or should have known of the wrongs committed by the Defendants was the *identical error* made by the district court in *Azalea Meats, Inc. v. Muscat*, 386 F.2d 5, 9 (5th Cir. 1967). The effect of such factually unfounded conclusions is to deprive Petitioners of their right to a trial by jury on the facts. *See Azalea, supra*, at 9. Petitioners' Complaint and other documents alleged facts which clearly showed the limitations period had not run as to any of the Plaintiffs under **Section 12(1)** and **12(2) of the 1933 Act** or under **Rule 10b-5.**

Petitioners presented controverting evidence on these points in their response to Respondent **EHRMAN's** Motion for Summary Judgment. Moreover, since the **EHRMAN** Respondents and their seller-agents were continually authorizing secondary offers and sales of the Securities to an unsuspecting public, in violation of **Rule 502(d) of Regulation D,** the unlawful "Ponzi Scheme" arguably never stopped. Petitioners are entitled to have a jury trial on the issues of the **EHRMAN** Respondents' fraudulent concealment of the truth, their active misrepresentations and the date when each Petitioner discovered, or, in the exercise of reasonable diligence, should have discovered the violations charged in this complex securities fraud case.

In a recent case very similar to this one, the Eleventh Circuit held that "summary judgment is appropriate where no reasonable jury could differ as to whether the plaintiffs exercised due diligence in discovering the fraud." *Durham v. Business Management Associates,* 847 F.2d 1505, 1509-1510 (11th Cir. 1988). In upholding the denial of summary judgment, the Eleventh Circuit quoted liberally from the Fifth Circuit's decision in *Azalea Meats, Inc., supra,* 386 F.2d at 9. *See Durham, supra,* 847 F.2d at 1509. Other Circuits have taken similar approaches. *See, e.g., Robertson v. Seidman & Seidman,* 609 F.2d 583, 589, 593 (2nd Cir. 1979); *Schaefer v. First National Bank,* 509 F.2d 1287, 1298 (7th Cir. 1975), *cert. denied,* 425 U.S. 943 (1976).

This is a classic case demanding reversal of the Panel's decision; it involves multiple Plaintiffs from all parts of the United States who were lured into a "Ponzi Scheme" designed to benefit those who participated in the scheme. The trial court's pronouncement of a date

when *each* Petitioner should have known of the alleged wrongdoing is not only erroneous on the factual record but has deprived each Petitioner of his Seventh Amendment right to a jury trial on admittedly contested issues of fact. *See, generally, Baltimore and C. Line, Inc. v. Rodman,* 295 U.S. 654, 657 (1935); *Ross v. Bernhard,* 396 U.S. 531 (1970); see also **App. E, pp. 77-80.**

To allow the Panel's decision to stand will frustrate the rights of securities fraud victims who have been duped by unscrupulous financiers who artfully conceal their wrongdoing.

III. THE FIFTH CIRCUIT PANEL'S APPLICATION OF SUMMARY JUDGMENT STANDARDS IS IN DIRECT CONFLICT WITH FIFTH PRECEDENT, THE PRECEDENT OF OTHER CIRCUITS, CLASHES WITH CONTROLLING SUPREME COURT CASE LAW GOVERNING SUMMARY JUDGMENT, AND THREATENS TO SEVERELY UNDERMINE THE CLEAR CONGRESSIONAL PURPOSE UNDERLYING THE SECURITIES LAWS AND THE RICO STATUTE.

THE SECURITIES LAW CLAIMS

Respondents' motions for summary judgment were based on two grounds – that the statute of limitations had run and general denials of wrongdoing. The **EHRMAN** Respondents, at the trial level, offered evidence which purportedly showed that some, but, admittedly not all, of Petitioners' claims were time barred.[2] Petitioners

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[2] In their motion for summary judgment, the **EHRMAN** Defendants admitted that Petitioners **JEAN STEUBING,**

(Continued on following page)

presented controverting evidence from: **a) EHRMAN'S** *Motion for Summary Judgment;* **b)** a February 23, 1988 Affidavit by **EHRMAN** (Exhibit 1 to Plaintiffs' Response to **EHRMAN'S** *Motion for Summary Judgment);* **c)** a June 14, 1989 Statement and Affidavit (Exhibits 2 and 3 in Plaintiffs' Response); **d)** excerpts from another of **EHRMAN'S** pleadings (Exhibit 4); **e)** a February 17, 1988 Affidavit by Wayne M. Byles (Exhibit 5); **f)** excerpts from Mr. Byles' deposition (Exhibit 6); and **g)** excerpts from the September 30, 1984 Offering Memorandum (Exhibit 7). The foregoing clearly demonstrate that Petitioners responded with more than mere generalities. They set forth specific facts and presented documentary evidence in controverting Defendants' assertions and in establishing a genuine issue worthy of trial.

Nevertheless, the Panel's decision states that Petitioners did not challenge the district court's findings with specific evidentiary material pulled from the record. The implication is made that Petitioners should have presented their own affidavits as competent summary judgment evidence. However, in *Isquith v. Middle South Utilities, Inc.*, 847 F.2d 186, 197-200 (5th Cir.), *cert. denied*, 109 S.Ct. 310 (1988), the Fifth Circuit made clear that non-movants need not always attach affidavits or summary judgment evidence of their own to support their position; the non-movant need only "show the district court, by

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(Continued from previous page)

RICHARD MIKLES, MJM VENTURE, CHARLES F. LACELLE and MICHAEL K. TOPALIAN purchased their units *on or after January 10, 1985.* They claimed the statute of limitations had run as to any investor who signed an agreement on or before December 7, 1984, three (3) years prior to the filing of Petitioners' lawsuit.

pointing to evidence in the record, that the movant has failed to sustain its initial burden." *Isquith, supra,* 847 F.2d at 199, *citing Celotex v. Catrett,* 477 U.S. at 332 (Brennan, J., dissenting on other grounds). The Fifth Circuit emphatically stated that "where the movant attaches summary judgment evidence which *supposedly* demonstrates that, as a matter of law, the movant must prevail on an element of the non-movants' claim, the non-movant should be able to answer the motion by arguing that the evidence raised a fact issue, which must be resolved at trial, concerning the element." *Isquith, supra,* at 847 F.2d at 199.

Furthermore, the Fifth Circuit held:

> **Not one of the cases holds – or even implies – that unless a non-movant files its own evidentiary materials, the non-movant is 'resting upon the allegations of its own pleadings'. Nor would such an implication be proper; if a non-movant points to record evidence which the movant used to support its claim to summary judgment, the non-movant has necessarily gone beyond the mere allegations of its pleadings.**

Id., at 199. Thus, it is clear that Respondents **EHRMAN, Et Al.,** the trial court and the Panel here, like the trial court in *Isquith,* "misperceived the burden on a party attempting to resist summary judgment." *Isquith, supra,* at 197. Here, Petitioners have repeatedly attacked the purported evidence of the Movants as itself creating countless issues of fact. Each Respondent's argument is simplistic and conclusory. All state they did nothing wrong and, as a last resort, they argue that the evidence conclusively shows that the statute of limitations has run despite the countless fact issues involved in that determination.

In *International Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 936 (1992), the Fifth Circuit, *citing Isquith*, held that a non-moving party can defeat a motion for summary judgment by demonstrating that evidence tendered by the moving party is itself laced with contradictions of fact. *International Shortstop, supra*, 939 F.2d at 1263-64. It is clear that, in this case, the Panel made no attempt to consider the entire record in a light most favorable to the non-moving party, the Petitioners here, as required by well established precedent, *International Shortstop*, 939 F.2d at 1264.

The moving party Respondents had the initial burden of affirmatively showing the non-existence of a "genuine issue" as to "any" material fact which would entitle them to judgment as "a matter of law". *Celotex Corp v. Catrett*, 477 U.S. 317, 323 (Majority) 328 (White, Concurring) 330 (Brennan, dissenting on other grounds). A conclusory assertion that the non-moving party has no evidence is insufficient where the record discloses, as it does in this case, that the moving party has overlooked even one witness who would provide relevant testimony for the non-moving party at trial. A court cannot find that the moving party has discharged its initial burden of production unless the moving party has sought to demonstrate the inadequacy of the witness' testimony. Absent such a demonstration, summary judgment must be denied on the grounds that the moving party has failed to meet its burden of production under **Rule 56.** *Celotex Corp. v. Catrett, supra*, 477 U.S. at 328 (White, concurring), 322-333 (Brennan, dissenting on other grounds). Here, Petitioners' detailed Pre-Trial Order listed 48 witnesses, **24** of whom were ready to testify as to each of the **28**

issues of fact listed by Respondents in their Pre-Trial Order. **(App. E, pp. 77-80).**

Respondents never met their "initial responsibility" of "Identifying those portions of [the record] which . . . demonstrate the *absence* of a genuine issue of material fact." *Celotex Corp. v. Catrett, supra,* 477 U.S. at 323 (Majority) (emphasis ours). Instead, after filing their summary judgment motions, some at the invitation of the Court, Respondents subsequently filed a Pre-Trial Order in which they candidly acknowledged the existence of no less than **28** contested issues of material fact and made numerous admissions of fact as well. **(App. E, pp. 77-80).** *See, Generally, Overview and Summary, supra.* As incredible as it may seem, at the invitation of the Court on August 28, 1989, the **RUSSEK** Defendants filed a Motion for Summary Judgment (October 30, 1989) after they had filed their Pre-Trial Order, wherein they, too, cited the **28** issues of contested material facts. It is undisputed that the court required the Pre-Trial Order to be filed and that Petitioners and Respondents did so.

THE RICO CLAIM

Equally erroneous is the Panel's treatment of Petitioners' **RICO** claims. At the request of the trial court, Petitioners filed a lengthy **RICO** case statement explaining in detail the basis of the **RICO** charges. Petitioners clearly set forth their financial injuries as a result of various predicate acts, including violations of **Section 10b** of the **1934 Securities Exchange Act** and Federal mail and wire statutes. Petitioners carefully outlined "acts (on the part of Respondents) that have the same or similar purposes, results, participants, victims, or methods of

commission," and that are otherwise "interrelated by distinguishing characteristics." *Sedima, S.P.R.L. v. Imrex Company, Inc.*, 473 U.S. 479, 496 at n.14 (1985) *Accord: H.J. Inc. v. Northwestern Bell Telephone Co.*, 109 S.Ct. 2893, 2901 (1989).

Accordingly, it is clear that the district court's grant of summary judgment to all Defendants on Plaintiffs' **RICO** claims and the Panels' affirmance based on Respondents' conclusory assertions of no wrongdoing were impermissible error.

IV. THE RECORD MAKES CLEAR THAT RESPONDENTS EHRMAN AND OTHER MOVING PARTIES KNEW THAT MATERIAL FACTUAL DISPUTES EXISTED WHEN THEY FILED THEIR SUMMARY JUDGMENT MOTIONS – MUCH LIKE THE MOVING PARTIES IN *GOKA V. BOBBITT*, 862 F.2d 646, 650 (7TH CIR. 1988), AND INTENDED TO "RAILROAD" PETITIONERS THROUGH AN ILLEGITIMATE AND PREMATURE MOTION FOR SUMMARY JUDGMENT

At the time Respondent **EHRMAN** filed his Motion for Summary Judgment, he was well aware that he was under an intense Securities and Exchange Commission investigation and that Petitioners were supplying the information. The SEC, based on affidavits provided by Petitioners and Plaintiffs in a related case, ultimately obtained the result Petitioners would have easily achieved had this case gone to trial – i.e., the liquidation of the partnerships and the appointment of a receiver.

The cases cited by Respondents in order to minimize their candid acknowledgement of at least 28 contested issues of material fact in this case – and erroneously relied on by the Panel – are of no help to them. In *Irving*

Trust Company v. United States, 221 F.2d 303, 305 (1955), the Second Circuit noted that there was "no dispute as to the underlying facts" in that case. Here, there are serious disputes as to the underlying facts, unlike the scenario panted in *Irving Trust*. Similarly, the case of *Taylor v. Allis-Chalmers Manufacturing Co.*, 320 F.Supp. 1381 (E.D. Pa. 1969) involved a starkly different situation than the one here – plaintiffs in that case had a jury trial on the merits. That case focused on the use of the pretrial order during the course of trial. In this case, however, there was never a trial on the merits despite Respondents' acknowledgement of 28 contested issues of material facts. Additionally, and contrary to the Panel's statement, it is undisputed that the district court required that the Pre-Trial Orders be filed and that they were, in fact, filed.

In *Goka v. Bobbitt*, 862 F.2d 646, 650 (7th Cir. 1988), the Seventh Circuit held:

> **When a party has obtained knowledge through the course of discovery, or otherwise, that a material factual dispute exists and yet proceeds to file a summary judgment motion in hopes that the opposing party will fail or be unable to meet its burden in responding to the motion, he defeats that purpose; and, more important, violates the rules of procedure which govern the conduct of trial, specifically Rule 11.**

That is the case here. Indeed, at least one Respondent thought it extraordinary that the district court was even entertaining motions for summary judgment given the Court's knowledge that Respondent **EHRMAN** had evaded being deposed. Other Respondents candidly admitted that discovery had not been completed. See generally, Overview and Summary, *supra*, pp. 10-13.

Unlike the non-movant in *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986), Petitioners have consistently made a "serious claim" that they were "railroaded" by premature motions for summary judgment which were patently unjust.

V. THE RECENTLY ENACTED SECTION 27A OF THE 1934 SECURITIES EXCHANGE ACT REQUIRES THAT PRE *LAMPF V. GILBERTSON* CASE LAW BE APPLIED TO THIS CASE

On December 19, 1991, the **Federal Deposit Insurance Corporation Improvement Act of 1991** became effective. **Subtitle M, Section 476 of the Act** has, as its intended effect, the retroactive overturning of this Court's decision in *Lampf v. Gilbertson*, 111 S.Ct. 2773 (1991). The new provision appears as Section 27A (a) and (b) of the 1934 Securities Exchange Act, as amended. **(App. B, p. 42).**

Section 27A, 15 U.S.C. 78 (aa), subsection (a) makes clear that that provision applies to "*any* private civil action . . . under section 10(b) . . . that was commenced on or before June 19, 1991 . . . " and which is currently pending. The statute, on its face, is clearly not limited to cases pending in a trial court. Accordingly, the Act only requires that the same legal standards relative to the statute of limitations which existed on June 19, 1991 be utilized. Those standards are the ones which the district court and the Panel erroneously missapplied in this case.

Accordingly, to the extent that the Panel's opinion, as amended, suggests that the limitations period is based on *Lampf*, it is incorrect. In any event, as already pointed out, it is clear that the lower court committed legal error

in its ruling regarding the running of the limitations period.

CONCLUSION

The Petition for Writ of Certiorari should be granted. The error of the lower courts is manifest and threatens to seriously undermine all private suits to enforce the federal securities laws; therefore, the Court may also wish to consider summary reversal of the lower court's opinions and order a trial on the merits. A reversal of the district court's grant of summary judgment would also require a reversal of the court's grant of summary judgment to Onshore and Defendants **E.I.G.** and **ROCKWOOD INSURANCE CO.** on their counter-claims against certain Plaintiffs.

Respectfully submitted,

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APPENDIX A

Michael K. Topalian, Don W. Boyett, Bobby W. McDonald, MJM Ventures, Richard H. Manuel, Jack E. Burroughs and Charles W. Anderson, Plaintiffs-Appellants,

v.

John N. Ehrman, Rockwood Insurance Company, et al., Defendants-Appellees.

Michael K. Topalian, Warren B. Fienga, Richard H. Manuel, Don W. Boyett, Bobby W. McDonald, Charles F. Lacelle and MJM Ventures, Plaintiffs-Counter Defendants-Appellants,

v.

John N. Ehrman, Etc., et al., Defendants,

Ehrman Investment Group, Inc., Defendant-Counter Plaintiff-Appellee,

and

Onshore Exploration Ltd. 1984 Mid-Year Drilling Program, Counter Plaintiff-Appellee.

Michael K. Topalian, et al., Plaintiffs-Appellants,

v.

John N. Ehrman, Individually, Etc., et al., Defendants-Appellees.

Nos. 90-2104, 90-2105 and 90-2106.

United States Court of Appeals,
Fifth Circuit

March 6, 1992.

Investors in oil and gas limited partnership brought action against general partners under federal securities

statutes and Racketeer Influenced and Corrupt Organizations Act (RICO). The United States District Court for the Southern District of Texas, Norman W. Black, J., entered summary judgment in favor of general partners, and investors appealed. The Court of Appeals, Emilio M. Garza, Circuit Judge, held that: (1) investors' securities claims were barred by limitations, and (2) investors' allegations were insufficient to state RICO claim.

Affirmed.

Appeals from the United States District Court for the Southern District of Texas.

Before DUHÉ, WILLIAMS, and GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

Onshore Exploration Ltd. ("Onshore") is a Texas limited partnership formed to engage in oil and gas drilling ventures. On December 3, 1987, plaintiffs – fifteen out of seventy-seven Onshore investors – brought this action against twenty-three defendants.[1] Plaintiffs, alleging that they suffered damages as a result of the offer and sale to them of limited partnership interests in Onshore and that they are the victims of a conspiracy in which all defendants participated, sought damages under:

> (i) sections 12(1) and 12(2), 15 and 17(a) of the Securities Act of 1933, as amended [15 U.S.C. §§ 77*l*(1)-(2), 77*o*, 77q(a) (1989)];

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[1] This action has spawned two sets of related counterclaims, and the case before this court is actually a consolidation of three related actions. *See infra* note 9.

(ii) section 10(b) of the Securities Exchange Act of 1934, as amended [15 U.S.C. § 78j(b) (1989)] and Rule 10b-5 thereunder (17 C.F.R. § 240.10b-50);

(iii) the Racketeer Influenced and Corrupt Organization Act (RICO) 18 U.S.C. § 1964(c) (1989)];

(iv) the Texas Securities Act [Tex.Rev.Civ.Stat.Ann., art. 581-33 (West Supp. 1987)]; and

(v) common law fraud and deceit, breach of fiduciary duty and "other conduct alleged to be in violation of the laws of the State of Texas."[2]

The district court, finding no material fact issues in dispute, granted defendants' motion for summary judgment. Plaintiffs now appeal from that judgment seeking:

(i) reversal of the district court's summary judgment in favor of defendants;

(ii) removal to a new court; and, ultimately,

(iii) rescission of the transactions resulting in purchase of investment units;

(iv) treble damages under RICO;

(v) imposition of a constructive trust;

(vi) appointment of a receiver;

(vii) costs and attorney's fees; and

(viii) "other relief as may be just and proper."

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[2] Not all defendants are alleged to have violated all of these laws.

Concluding that plaintiffs have failed to set forth specific facts and establish a genuine issue worthy of trial, we affirm the district court's summary judgment in favor of defendants.

I

A

Onshore was formed in September 1984 under Texas law for the purpose of raising funds for oil and gas drilling ventures. The enterprise was presented to potential investors as a tax shelter and a sound, legitimate investment vehicle. On September 26, 1984, Onshore entered into a Joint Venture Agreement with Defendant Houston Petroleum Company ("HPC"), Onshore agreeing to use its best efforts to raise a minimum subscription of $3,600,000 in capital contributions on or before October 31, 1984.

The defendants, general partners of Onshore, decided to raise this 3.6 million dollars by selling limited partnership units. Onshore actively began to solicit investors in November 1984. According to plaintiffs, Onshore's general partners represented to prospective investors that the Onshore offering was exempt from registration under the Security and Exchange Commission's Rule 506 of Regulation D. *See* 17 C.F.R. § 230.506 (1989).[3] This Rule

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[3] Offerings made to credited investors and pursuant to Regulation D are exempt from the registration requirements of section 5 of the Securities Act of 1933. *See* 15 U.S.C. § 77e (1989). It is undisputed that the Onshore offering was not registered with the SEC under section 5.

506 exemption to the registration requirements of section 5 of the Securities Act of 1933 is limited to offering made to *not more than 35 non-accredited investors. See id.* Although the Onshore offering was made primarily to accredited investors, defendants and their seller-agents allegedly offered and sold the Onshore securities to more than 35 non-accredited investors.

In their effort to obtain adequate financing, defendants printed at least two different offering memoranda, one dated September 30, 1984 and another dated November 30, 1984.[4] The November 30, 1984 memorandum stated that the offering termination date – the date by which the partnership needed to raise a minimum subscription of $3,600,000 in capital contributions – was December 31, 1984.[5] As that deadline approached, defendants were short of the minimum subscriptions required to continue the partnership. Rather than dissolving the partnership and reimbursing the limited partners as promised in the original offering memoranda, in January 1985 Onshore forwarded a document to each investor

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[4] Investors were given the option of subscribing to an Onshore unit by either paying cash or by executing a promissory note for the full amount of their subscriptions. A total of 77 investors bought the units, including fourteen of the fifteen plaintiffs.

[5] The offering termination date was actually October 31, 1984 "unless the subscription is extended for up to two additional one-month periods. . . . " Appellants' Record Excerpts at tab 13, *Topalian v. Ehrman*, Nos. 90-2104, 90-2105, 90-2106 (5th Cir. filed Oct. 24, 1990) (Onshore Exploration Ltd. 1984 Mid-Year Drilling Program) ["Appellants' Record Excerpts"].

who had subscribed on or before December 31, 1984 which permitted each subscriber to rescind or affirm her respective purchase of Onshore interests. To compensate for Onshore's subscription deficiency, the general partners then allegedly decided to pledge the limited partners' promissory notes as security for a bank loan made to Onshore by Interdiscount Ltd. ("IDL") and guaranteed by Ehrman Investment Group, Ltd. ("EIG").[6] These loan proceeds were allegedly spent financing the Onshore venture.

B

Plaintiffs filed their original complaint on December 3, 1987. On December 18, 1987, they filed their first amended complaint, alleging that, with the help of others, Onshore's general partners – E.I.G. and W. Roderick Johnson – engaged in a scheme to defraud them in the sale of Onshore limited partnership securities.

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[6] Six of the plaintiffs defaulted on promissory notes executed to finance their subscriptions. EIG (guarantor on payment of the loan made to Onshore by IDL) has been sued by Rockwood Insurance Company ("Rockwood") – a firm that issued investor bonds insuring the payment of the promissory notes used to finance Onshore – as a result of the default of several investors, including these six plaintiffs. EIG and Onshore filed counterclaims seeking payment of the amount due on these notes by these plaintiffs. Also, defendant Rockwood filed a counterclaim against seven of the plaintiffs seeking a money judgment on promissory notes and indemnification agreements, and EIG and Onshore have filed another counterclaim against plaintiff Warren Fienga ("Fienga"), who defaulted on a cash call when he stopped payment of his $8,000.00 check to Onshore.

Defendants filed motions to dismiss, and, with the exception of claims brought under section 17 of the Securities Act of 1933, the district court denied these motions. Plaintiffs were directed to amend their complaint to specifically refer to the defendants against whom allegations were being made and comply with the court's RICO standing order. Discovery commenced. In August 1988, plaintiffs filed their Second Amended Complaint, which the district court struck.[7] In September 1988, plaintiffs filed a Motion for Leave to File a Second Amended Complaint or in the Alternative Motion for Joinder of Persons Needed for Just Adjudication. In October 1988, the district court held a pre-trial conference on matters including this motion – a motion the district court ultimately denied.

In January 1989, the court considered a joint motion to amend the scheduling order of August 1988, and extended the discovery cut-off date to April 1989. At this January hearing, the court admonished all counsel to cooperate in discovery and reserved a ruling on pending motions for sanctions. The court set July 28, 1989 for the hearing and disposition of pending motions.

Defendants filed motions for summary judgment on June 15, 1989. Although responses to these motions were due on July 10, 1989, plaintiffs did not file their responses until July 27, 1989. Plaintiffs were also late in filing their motions for summary judgment. In October 1989, the

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[7] The district court struck plaintiffs' Second Amended Complaint, which was some 185 pages and 630 paragraphs long, because plaintiffs failed to obtain leave of court, as required by Rule 15(a) of the Federal Rules of Civil Procedure.

district court granted summary judgment in favor of the Ehrman defendants and against plaintiffs. In December 1989, the district court first granted summary judgment in favor of EIG, Onshore, and Rockwood on their counterclaims against certain plaintiffs. Later that same month, the district court entered its final judgment, granting summary judgment to all the remaining defendants. The district court also held a hearing on pending motions for sanctions and granted defendants' motion for sanctions against some of the plaintiffs and against their counsel, Mr. Armando Lopez.

II

Plaintiffs seek reversal of the district court's grant of summary judgment, and they have pinned a tail of reversible-error assertions to this summary judgment challenge.[8] Defendants deny plaintiffs' allegations, and they allege that even if the facts were true, plaintiffs' causes of action are time-barred by (i) the one and three-year statutes of limitations applicable to claims brought under the Securities Act of 1933, (ii) the two-year statute of limitations applicable to claims under the Securities Exchange Act of 1934, and (iii) the fact that plaintiffs failed to state a claim under RICO. Some of the defendants deny participating in the offer and sale of the units,

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[8] Ultimately, they seek much more – rescission of the transactions which resulted in the purchase of the units, treble damages under RICO, imposition of a constructive trust, appointment of a receiver, costs and attorney's fees, and "other relief as may be just and proper."

and they further deny that they had any fiduciary or other duty to any of the plaintiffs.

This case is the product of consolidation.[9] We have diligently sorted through the numerous bundles of issues the parties have toted before us, and our efforts have resulted in six groupings:

(a) Did the district court err in granting defendants' motions for summary judgment?

(b) Did the district court err in granting defendants' motions for summary judgment on the counterclaims against plaintiffs?

(c) Did the district court err in denying plaintiffs' Motion to File a Second Amended Complaint or, in the Alternative, a Motion for Joinder of Persons Needed for Just Adjudication?

(d) Did the district court dismiss IDL as a party solely as a Rule 11 sanction to punish plaintiffs for allegedly filing a frivolous claim and, if so, is the district court in contempt of the Fifth Circuit's mandate to reinstate IDL as a party?

(e) If this court should reverse the district court, is there sufficient evidence in the record to justify reassignment of this case to another judge?

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[9] The case is actually a conglomeration of three cases on appeal, *Topalian v. Ehrman & Rockwood Ins. Co.*, No. 90-2104 (5th Cir.); *Topalian v. Ehrman & Ehrman Investment Group*, No. 90-2105 (5th Cir.); *Topalian v. Ehrman*, No. 90-2106 (5th Cir.). The record consists of some 323 docket entries.

(f) Should this court grant Rockwood's Motion for Sanctions?

A & B

1

Since this case is an appeal from a grant of summary judgment, this court reviews the record de novo. *See International Shortstop, Inc. v. Rally's*, 939 F.2d 1257, 1263 (5th Cir.1991). Our inquiry as to whether the district court properly granted summary judgment in defendants' favor is guided by Rule 56 of the Federal Rules of Civil Procedures and three Supreme Court cases. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2550, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2505-14, 91 L.Ed.2d 202 (1986); *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

Summary judgment is proper if the movant demonstrates that there is an absence of genuine issues of material fact. *See Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510. Such a showing entitles the movant to summary judgment as a matter of law. *See* Fed.R.Civ.P. 56(c). The movant accomplishes this by informing the court of the basis for its motion, and by identifying portions of the record which highlight the absence of genuine factual issues. *See generally id.* Once the movant produces such evidence, the nonmovant must then direct the court's attention to evidence in the record sufficient to establish that there is a genuine issue of material fact for trial – that is, the nonmovant must come forward with evidence establishing each of the challenged elements of its case

for which the nonmovant will bear the burden of proof at trial. *See Catrett*, 477 U.S. at 322, 106 S.Ct. at 2552.

The nonmovant can satisfy its burden by tendering depositions, affidavits, and other competent evidence to buttress its claim. *See Rally's*, 939 F.2d at 1263; *see also* Fed.R.Civ.P. 56(e). Mere conclusory allegations are not competent summary judgment evidence, and they are therefore insufficient to defeat or support a motion for summary judgment. *See Galindo v. Precision American Corp.*, 754 F.2d 1212, 1216 (5th Cir.1985); *United States v. An Article of Drug*, 725 F.2d 976, 984-85 (5th Cir.1984). Nor may plaintiffs rest upon mere allegations made in their pleadings without setting forth specific facts establishing a genuine issue worthy of trial. *See Anderson*, 477 U.S. at 248-49, 106 S.Ct. at 2510; *C.F. Dahlberg & Co., Inc. v. Chevron U.S.A., Inc.*, 836 F.2d 915, 920 (5th Cir.1988). In reviewing a grant of summary judgment to determine whether the law was applied correctly, this court only considers papers that were before the trial court.[10] *See*

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[10] This court's inquiry is limited to the summary judgment record before the trial court: the parties cannot add exhibits, depositions, or affidavits to support their positions on appeal, nor may the parties advance new theories or raise new issues to secure reversal. *See Munoz v. International Alliance of Theatrical Stage Employees*, 563 F.2d 205, 209 (5th Cir.1977); *see generally* CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2716 at 651-54 (Civil 2d. vol. 10 1983). Facts not presented at trial cannot be asserted on appeal. *Garcia v. American Marine Corp.*, 432 F.2d 6, 8 (5th Cir.1970) ("Any action on appeal can be properly based only on matters considered at trial: . . . [a] court may not therefore, reverse [summary judgment] on the basis of facts not in the record").

Nissho-IWAI American Corp. v. Kline, 845 F.2d 1300, 1307 (5th Cir.1988). Moreover, this court cannot decide disputed issues of material fact. *Id.*[11] Summary judgment is appropriate, therefore, if the nonmovant fails to set forth specific facts, by affidavits or otherwise, to show there is a genuine issue for trial. *See Marsh v. Austin-Fort Worth Coca-Cola Bottling Co.*, 744 F.2d 1077, 1079 (5th Cir. 1984).[12]

2

The district court's opinion, organized first claim-by-claim and then defendant-by-defendant, establishes the basis upon which the court dealt with each of the claims raised by plaintiffs.[13] *See* Record Excerpts at tab 2 (Memoranda and Order at 9-30) ["Order"]. The appropriate way to challenge these findings would have been for plaintiffs to explicitly respond to them, point-by-point, with specific facts and evidentiary challenges pulled from the record. *See supra* note 12; *see generally supra* Part II.A-B.1. That, unfortunately, is not what the plaintiffs have chosen/been able to do. Rather, plaintiffs have stepped

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[11] For more cases discussing how summary judgment should be reviewed on appeal, see *Herrera v. Millsap*, 862 F.2d 1157, 1159-60 (5th Cir.1989); *Reid v. State Farm Mut. Ins. Co.*, 784 F.2d 577, 578 (5th Cir.1986).

[12] A grant of summary judgment is not precluded by a dispute as to immaterial fact. *See Houston North Hospital Properties v. Telco*, 688 F.2d 408, 410 (5th Cir.1982) (citations omitted).

[13] A summary of the court's findings and rulings is attached as an Appendix.

back from the district court's opinion and responded with general challenges to the court's very specific findings.[14] To fully resolve each of these contentions, we consider them individually.

(a)

Did the district court err in finding that disclaimers in offering memoranda shielded defendants from accusations of misrepresentation?

Plaintiffs have briefed a lengthy list of misrepresentations allegedly made by defendants. The gist of plaintiffs' overall argument is that: (i) they were induced to purchase interests in Onshore with promises of low risk and

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[14] Plaintiffs argue that the district court committed reversible error by:

> (a) failing to note twenty-eight (28) contested issues of material fact listed in Defendants' Joint Pretrial Order Filed *after* Defendants had made their summary judgment motions; (b) totally failing to discuss how the moving party Defendants had satisfied their burden of production or the legal standard for making that determination; (c) assuming that the moving party Defendants had satisfied their burden of production of the legal standard for making that determination; (d) and overlooking deposition testimony and other documents presented by the non-moving Plaintiffs, including Plaintiffs' Pretrial Order, which identified twenty-four (24) witnesses prepared to testify as to each issue based on their personal dealings with Defendants.

Appellants' Brief at vi, *Topalian v. Ehrman*, Nos. 90-2104, 90-2105, 90-2106 (5th Cir. filed Oct. 24, 1990) ["Appellants' Brief"].

high profits, and that, (ii) even though plaintiffs were given a rescission opportunity when the financing deadline established in the first memorandum expired, that opportunity was not an honest one and defendants are, therefore, liable for their misrepresentations.

As noted by the district court, despite their differences, both memoranda warned plaintiffs of the Onshore risk.[15] Moreover, the differences between these two memoranda are harmonized by Onshore's rescission offer – defendant's opportunity to, in essence, enforce the terms of the first memorandum by walking away from the Onshore deal. Although plaintiffs assault the legitimacy of that opportunity,[16] they have produced no tangible

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[15] Specifically, the district court noted that:

> [b]oth documents warn the investor of the "high degree of risk" and both state, ' . . . and, accordingly, there is no assurance that any distributions will . . . be made to the limited partners.' . . . Further, along with the second memorandum, each investor was sent an 'offer of [rescission].' . . . the Plaintiffs do not deny signing any of the documents. What they do deny is that they *read* any of the documents either before or after signing them.

Order at 11-12; *id.* at 14 ("The offering memorandum clearly states that the investors might never see a penny of their investment and might never make a profit. The promissory notes clearly state that the signer is responsible for the debt. It is well settled law that an adult is responsible for reading the documents he signs.").

[16] According to plaintiffs, [t]he unlawful rescission offer was made after December 31, 1984, it was not

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evidence to suggest anything less than "fair play" on the part of defendants. Such was the observation of the district court[17] and, having reviewed the summary judgment record thoroughly, we agree with and affirm the district court's findings.

(b)

Did plaintiffs know, or should plaintiffs have known, about defendants' alleged misrepresentations by May 1, 1985?

The controlling date for purposes of the running of the respective statutes of limitations is when a purchaser of securities knew – or in the exercise of reasonable

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> made to all subscribers, did not require an affirmative reconfirmation and was not accompanied by a disclosure including all information necessary to update previously provided disclosures. Furthermore, Defendants did not give any disclosure materials to Plaintiffs until well after the Partnership had secured financing.

Appellants' Brief at 26-27. And appellants add, "Defendants were able to resell the units to Plaintiffs while Plaintiffs were still under the influence of Defendants' continuing fraudulent misrepresentations and high-pressure selling tactics" *Id.* at 26.

[17] *See* Order at 27:

> Nothing appears to have been kept secret from the Plaintiffs. In fact, in their depositions, they admit their ignorance of any wrongdoing. They all state that they did not read any of the documents they received in connection with Onshore, including the ones they signed, or they scanned them, did not understand them but sought no explanation.

diligence, should have known – of the alleged wrongdoing. *See Corwin v. Marney, Orton Invs.*, 843 F.2d 194, 197 (5th Cir.), *cert. denied*, 488 U.S. 924, 109 S.Ct. 305, 102 L.Ed.2d 324 (1988), *citing Breen v. Centex Corp.*, 695 F.2d 907, 911 (5th Cir.1983). Plaintiffs challenge the district court's finding that they knew or should have known of defendants' alleged wrongdoing by May 1, 1985. They argue that "[d]efendants intentionally and fraudulently omitted and concealed all relevant facts from Plaintiffs."[18] Plaintiffs also argue that they have met their evidentiary burden for surviving defendants' motions for summary judgment.[19]

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[18] Appellants' Brief at 44. In fact, plaintiffs go so far as to contend that "[t]he question of whether a party had sufficient opportunity so that in the exercise of reasonable diligence he would have discovered the facts forming the basis of his cause, invariably raised questions of fact." Appellants' Brief at 43.

[19] Appellants' Brief at 42:

> The Court's finding is not only preposterous but in conflict with: (a) portions of its own Opinion which repeatedly states that Plaintiffs lacked knowledge of any wrongdoing by certain Defendants at the time of the alleged wrongs; (b) Defendants' Pretrial Order which states that the date when each Plaintiff should have known of the alleged wrongs as to each Defendant was a contested issue of fact; (c) Plaintiffs' Complaint and other documents which consistently state that Defendants fraudulently concealed their wrongdoing and prevented Plaintiffs from suspecting any wrongdoing until May, 1987; (d) the uncontested fact that selling activities were still continuing and all Plaintiffs were just receiving the "Other" Memorandum on May 1, 1985, the date used by the Court; and (e) the fact that Defendants continuously authorized secondary sales of restricted securities for an indefinite period.

General allegations of concealment inserted in plaintiffs' complaint or pretrial order are simply not enough to either toll a statute of limitations or survive a motion for summary judgment. We find that the district court rightfully demanded more. *See generally supra* Part II; *see also Irving Trust Co. v. United States*, 221 F.2d 303, 305 (2d Cir), *cert. denied*, 350 U.S. 828, 76 S.Ct. 59, 100 L.Ed. 740 (1955) (despite pretrial order specifying a number of issues being contested, judge may grant motion for summary judgment upon showing that there is no genuine issue to be tried).[20]

(c)

Is there a genuine issue of material fact as to when the limitations period on plaintiffs' causes of action under sections 12(1) and 12(2) of the 1933 Securities Act began to run?

Plaintiffs argue that there is a genuine issue of material fact as to when the limitations period on their causes of action under sections 12(1) and 12(2) of the Securities Act of 1933 began.[21] In short, plaintiffs argue that

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[20] The *Irving* court also noted the function of summary judgment – to make determinations without the expense and delay of trial where there are no real issues – and found that statements in pretrial order do not preclude entry of summary judgment. *Id.*

[21] Section 12(1) creates civil liability where mail and other instrumentalities of interstate commerce are used in the sale, delivery, or offer of sale of an unregistered security; section 12(2) imposes liability on any person who offers or sells a security "by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading. . . . " 15 U.S.C. § 77*l*(2) (1989).

defendants assured them that Onshore would be a sound and lucrative venture. Defendants contend, however, that the district court correctly concluded that investors were not diligent in bringing their claims under the Securities Act of 1933. More precisely, defendants stress that Plaintiffs did not furnish any evidence or cite any authorities to rebut the evidence and authorities offered by defendants regarding the one-year statute of limitations on plaintiffs' claims under § 12(2) of the Securities Act of 1933. *Codified at* 15 U.S.C. § 77*l*(2) (1989).

Each plaintiff signed a subscription agreement when they purchased Onshore interests -- a subscription agreement that should have put these investors on notice of the speculative nature of their investment. It certainly triggered a reason to exercise reasonable diligence.[22] If plaintiffs subsequently were told something contrary to this agreement that should have dyed the flag raised by the subscription agreement an even brighter shade of red.

Section 13 of the Securities Act of 1933 provides:

> No action shall be maintained to enforce any liability created under section 77k or 77*l*(2), of this title unless brought within one year after the discovery or the untrue statement of the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 77*l*(1), of this title, unless brought within one year after the violation upon which it is based. *In no event* shall any such action be brought to enforce a liability created

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[22] See *supra* Parts II.A-B.2.b.

> under . . . section 77*l*(1) more than three years after the sale.

Codified at 15 U.S.C. § 77m (1989) (emphasis added). Plaintiffs filed this lawsuit on December 3, 1987. All of the plaintiffs, with the exceptions of Steubling, LaCelle, Mikles and MJM, purchased their Onshore units before November 30, 1984 by executing the subscription agreements. Therefore, under the discovery rule of section 77m of Title 15,[23] the latest date that any of these plaintiffs could have filed suit in order to toll the one-year limitation period would have been December 1, 1985. Even if we were to disregard the discovery rule of section 77m, the latest date that these plaintiffs could have filed suit to toll the three-year limitation period would have been December 1, 1987. In short, plaintiffs' claims are barred by both of the limitation periods in section 77m of Title 15. Steubling, LaCelle, Mikles, and MJM purchased their Onshore units and executed the subscription agreement by May 1, 1985. Accordingly, their claims are barred by the one-year limitation prescribed by section 77m of Title 15.

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[23] This section reads:

> No action shall be maintained to enforce any liability created under section 77k or 77*l*(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 77*l*(1) of this title, unless brought within one year after the violation upon which it is based. In no event shall any such

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(d)

Were plaintiffs' 10(b) and 10(b)(5) claims properly time-barred?

Plaintiffs have tucked a related "catchall" contention within the pages of their brief – namely that they have suffered financial injuries as a result of various predicate acts, including violations of section 10(b) and federal mail and wire fraud statutes. Plaintiffs elaborated upon this contention in their Supplemental Brief. *See* Supplemental Brief on the Impact of the Supreme Court's Recent Decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow vs. Gilbertson* (filed Sept. 3, 1991) ["Supplemental Brief"].

In *Lampf*, the United States Supreme Court, in a majority opinion authored by Justice Blackmun, held that: (i) the statute of limitations applicable to actions under section 10(b) consists of the one-and-three-year provisions of the Securities Exchange Act and Securities Act for causes of action which they specifically provided for; and that (ii) equitable tolling is not applicable. *See Lampf v. Gilbertson*, ___ U.S. ___, 111 S.Ct. 2773, 2781-82, 115 L.Ed.2d 321 (1991). Plaintiffs, with *Lampf* in hand, argue that it is beyond dispute that all plaintiffs filed this

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action be brought to enforce a liability created under section 77k or 77*l*(1) of this title more than three years after the security was bona fide offered to the public, or under section 77*l*(2) of this title more than three years after the sale.

lawsuit within the three-year cut-off of Section 9(e). They then go on to argue the dissenting position of Justices Kennedy and O'Connor – "that a 3-year absolute time bar is inconsistent with the practical realities of § 10(b) litigation[,]" given the difficulties in discovering whether a violation of the securities laws occurred at all. *Lampf*, 111 S.Ct. at 2790.

In dealing with plaintiffs' section 12 claims, the district court applied the one- and three-year limitations periods prescribed for those actions.[24] The same reasoning and the same undisputed evidence establishes that plaintiffs' 10b-5 claims are barred by the one- and three-year statute recognized in *Lampf*. Moreover, without the benefit of *Lampf*, the district judge applied a two-year statute to plaintiffs' Rule 10b-5 claims.[25] If plaintiffs' claims were barred by a two-year statute of limitations, they are necessarily barred by the one-year statute of limitations recognized in *Lampf*. Accordingly, we affirm the district court's finding that plaintiffs' section 10(b) and Rule 10(b)(5) claims are time-barred.

(e)

Were plaintiffs' RICO claims properly barred?

The district court granted defendants' motions for summary judgment on plaintiffs' RICO claims, finding that:

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[24] *See supra* Parts II.A-B.2.c.

[25] *See* Order at 13.

[Plaintiffs] responded late and did not respond at all to the portion of the motion dealing with the RICO claims. The evidence already of record, presented by other Defendants, or by Ehrman with the motion, shows no evidence of illegality or factual dispute. The Court finds that Plaintiffs have failed to state a claim under RICO against the Ehrman Defendants.[26]

Our review of the record supports these findings, and plaintiffs have added nothing new in their presentation to this court.[27] We therefore find that plaintiffs' RICO claims were properly barred.

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[26] Order at 15. Specifically, the court stated that:

The summary judgment evidence shows that the efforts expended by the Defendants were all legitimate business practice. Ehrman and the other Defendants entered into agreements for the partnership to participate in drilling programs. Financing was arranged. Units were offered and sold to the Plaintiffs and other investors. Wells were drilled, some produced oil or gas and the Partnership was paid its share of money due. The Offering Memorandum and other documents state how the money would be paid out of funds received. This is normal business practice. There is no evidence of illegality.

[27] Plaintiffs' entire RICO argument is as follows:

However, throughout the text of their Complaint as well as in the RICO statement, Plaintiffs clearly detailed that they were fraudulently induced to make sizeable investments of money in an "Enterprise" which was conceived, developed and operated for the unjust enrichment of the Defendants. The "Enterprise" referred to is clearly the limited

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(f)

Did the district court err by assuming defendants had no responsibility with respect to their authorization of secondary offers and the sale of restricted onshore units?

According to plaintiffs, the record shows that defendants sold securities to people whom defendants knew could not afford them – people, some of whom were on the verge of bankruptcy, who indicated that they did not have the money to purchase the securities, along with other "unsuitable and unsophisticated" investors. Plaintiffs also assert that, in their Proposed Pretrial Order, they offered the district court a list of twenty-four witnesses capable of testifying as to these matters.[28]

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> partnership – ONSHORE. It was plain to see that they were not referring to the Defendants as the "Enterprise."
>
> Plaintiffs do contend, however, that all the Defendants conducted or participated, directly or indirectly, in the business affairs of the limited partnership – the Enterprise – through a pattern of racketeering activity in violation of 18 U.S.C. § 1962. *All of the Defendants were an integral part* of the scheme to deprive Plaintiffs of their investment in ONSHORE. They each participated in the scheme to unjustly enrich themselves to the loss and detriment of the Plaintiffs.

Appellants' Brief at 48 (emphasis added).

[28] More specifically, plaintiffs allege that:

> The Defendant General Partners and their seller-agents consciously ignored the Partnership's "Suitability Standards" by offering units to prospective

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This is all the plaintiffs have to offer – no specific allegations, not even so much as general allegations balanced upon the tip of a factual kernel, to connect the activity of any defendant(s) to what plaintiffs allege. *See generally supra* Part II; *see also* Fed.R.Civ.P. 56(e) (Nonmovant "may not rest upon the mere allegations or denials of the adverse party's pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial."); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49, 106 S.Ct. 2505, 2510-11, 91 L.Ed.2d 202 (1986) (movant has burden of showing that no genuine issue of fact exists, but non-moving party is not thereby relieved of producing evidence that would support jury verdict). Which of the defendants made such offerings, and to whom? Which investors indicated they did not have the money to purchase, and what exactly did they say? Plaintiffs' allegations are better suited for a complaint. After some eighteen months of discovery, tens of thousands of pages of deposition and transcripts, thousands of pages of documents and extensive interrogatories and admissions, there should be more. The burden to discover a

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> investors who did not qualify, some of whom indicated that they did not have the money to purchase a unit. However, the guarantees of no loss, the expectancy of a return of three or four times the initial investment, the "no cash down basis" and the assurances that limited partners could sell back their shares for double what they paid were irresistible lures to Plaintiffs and others.

Appellants' Brief at 24.

genuine issue of fact is not on this court.[29] Accordingly, we find that summary judgment was appropriate.

(g)

Should summary judgment granting defendants' counterclaims be reversed?

The Ehrman defendants moved for summary judgment on their counterclaims against several plaintiffs regarding unpaid promissory notes and cash calls used by these defendants to purchase Onshore interests. The evidence shows that the named plaintiffs signed the notes and have not paid them, and plaintiffs have made no showing to the contrary.[30] The district court's grant of summary judgment on this issue is supported by our recent holding in *Colony Creek, Ltd. v. Resolution Trust Corp.*:

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[29] *See Nissho-Iwai American Corporation v. Kline*, 845 F.2d 1300, 1307 (5th Cir.1988) (court not required to search entire record to ensure that record is "bereft of genuine issue of material fact.").

[30] The evidence we allude to includes deposition testimony, copies of signed notes, and *unanswered* interrogatories and requests for admissions from defendants to plaintiffs. In the words of the district court:

> Mr. Lopez is obviously not aware of the law in regard to responding to a motion for summary judgment. If factual issues abound, this was the time to present them, with supporting documentation, to this court. Mr. Lopez has failed to present more than unsubstantiated allegations. . . .

Order at 15.

> We have said before that because of the relative simplicity of the issues involved, suits to enforce promissory notes "are among the most suitable classes of cases for summary judgment." *Lloyd v. Lawrence*, 472 F.2d 313, 316 (5th Cir. 1973). This statement holds true today Appellee's motion and supporting materials established the elements necessary for recovery: the RTC holds a valid claim against Colony Creek and Goldberg, the note has matured according to its terms, and Colony Creek and Goldberg have defaulted.

941 F.2d 1323, 1325 (5th Cir.1991) (citations omitted).[31] Accordingly, we affirm the district court's grant of summary judgment on defendants' counterclaims.

(h)

Plaintiffs' other summary judgment contentions

We have sifted through plaintiffs' briefs and found numerous points tucked within their pages. Our efforts have separated out a few more contentions worthy of discussion.

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[31] *See also Hemphill v. Greater Houston Bank*, 537 S.W.2d 124, 125 (Tex.Civ.App. – Houston, [14th Dist.] 1976, no writ) (holding that summary judgment is appropriate if summary judgment proof establishes that moving parties are holders of the notes, the notes have matured according to their terms, and nonmoving parties have defaulted).

(1)

The issues identified in defendants' pretrial Order

Throughout their brief and during oral argument, plaintiffs have argued that the defendants' Pretrial Order, filed after their Motions for Summary Judgment, identified twenty-eight contested issues of material fact, and that plaintiffs' own Proposed Pre-trial Order lists at least twenty-four witnesses prepared to testify about defendants' fraudulent inducements and assorted Onshore wrongdoings. Plaintiffs argue that these issues are sufficient to defeat defendants' motions for summary judgment.

Defendants assert that this contention lacks merit for two reasons: (i) a pre-trial order is not competent summary judgment proof and (ii) plaintiffs' list of contested issues do not create "issues of material fact" as that term is used for the purposes of summary judgment. We agree. First, plaintiffs' "list of unfiled fact issues for the proposed pretrial order does not constitute summary judgment evidence, but is merely in the nature of pleadings, which cannot be used to create an issue of fact." *Geiserman v. MacDonald*, 893 F.2d 787, 793 (5th Cir.1990) (citation omitted); *accord Irving Trust Company v. United States*, 221 F.2d 303, 305 (2d Cir.), *cert. denied*, 350 U.S. 828, 76 S.Ct. 59, 100 L.Ed. 740 (1955). Rule 56(e) of the Federal Rules of Civil Procedure requires a nonmovant to go beyond pleadings to establish the presence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). Second, the Supreme Court has discussed "materiality" and where, as here, the summary judgment evidence

establishes that one of the elements of the plaintiffs' cause of action does not exist as a matter of law, or that plaintiffs' cause of action is barred by a statute of limitations, all other contested issues of fact are rendered immaterial. *See Celotex*, 477 U.S. at 323, 106 S.Ct. at 2552 ("[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.").[32]

(2)

The deposition testimony of defendant Joel Middlebrook

According to plaintiffs, the district court ignored important deposition testimony of defendant Joel Middlebrook,

> which candidly revealed that Defendants Houston Petroleum Company (H.P.C.) and John N. Ehrman (Ehrman) put on "dog-and-pony shows" to entice prospective investors to purchase limited partnership securities (units) and engaged in prohibited general solicitations of potential investors in violation of SEC Rule

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[32] Similarly, in *Anderson v. Liberty Lobby, Inc.*, the Supreme Court stated that "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986) (citation omitted).

> 502(c) of Regulation D, 17 C.F.R. § 230.502(c), promulgated under the 1933 Securities Act.[33]

We disagree. After eighteen months of discovery, the only "evidence" plaintiffs produced in response to defendants' motions for summary judgment was an unsigned letter and a one-page excerpt from Ms. Joel Middlebrook's deposition, the bookkeeper for the Houston Petroleum Company.[34] Ms. Middlebrook did not purchase any Onshore shares, nor is she a plaintiff in this lawsuit. While the deposition excerpt and letter do illustrate Ms. Middlebrook's dissatisfaction with HPC, neither of these provides reliable evidence that HPC or O'Donnell have, or may have, violated the Securities Act or RICO. Such insignificantly probative facts are insufficient to satisfy plaintiffs' summary judgment burden. *See Anderson*, 477 U.S. at 249-50, 106 S.Ct. at 2511.

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[33] Appellants' Brief at 2. The testimony in question has been reproduced in Record Excerpts at 466 (Filed Jan. 8, 1991):

> Q And what was the occasion that brought about your learning of Houston Petroleum Company?
>
> A Well, one time I went to their office, before they started the program, and visited with them. They had several people there that showed the office and what they were going to drill, and so on. It was a kind of a dog-and-pony show for potential investors that John had set up and did.

[34] The district court properly characterized that letter as "a rambling stream of consciousness letter from one Defendant to another which proves nothing." Order at 22.

C

Plaintiffs also assert that the district court erred in denying their Motion to File a Second Amended Complaint, which, according to plaintiffs, detailed the history and pattern of defendants' unlawful activities and alleged that a subsequent non-registered offering – Texas Energy Ltd. – by Ehrman and others was a continuation of defendants' investment scheme. District courts generally are afforded great discretion regarding trial procedure applications (including control of the docket and parties), and their decisions are reviewed only for abuse of discretion. *See Pierce v. Underwood*, 487 U.S. 552, 108 S.Ct. 2541 2546-47 & n. 1, 101 L.Ed.2d 490 (1988). Rule 15(a) of the Federal Rules of Civil Procedure provides that:

> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by the written consent of the adverse party; *and leave shall be freely given when justice so requires.*

Fed.R.Civ.P. 15 (emphasis added). Applying Rule 15, this court has stated that whether to allow an amendment is a decision to be made by the district court. *See Ross v. Houston Indep. Sch. Dis.*, 699 F.2d 218, 228 (5th Cir.1983). Precisely,

> [o]nce a responsive pleading has been filed, a pleading may be amended only by leave of court or by consent of the adverse party. Fed.R.Civ.P. 15(a). While "leave shall be freely given when justice so requires," the decision rests in the sound discretion of the trial court . . . . Our review extends only to whether the trial court abused that discretion.

Id. at 228 (citations omitted).[35]

This case's convoluted procedural history suggests that it is litigation with *Bleak House* potential. One chapter within that history is the *opportunity plaintiffs were given* to amend their complaint on December 18, 1987. Another is the *opportunity plaintiffs were given,* following the court's granting of an extension of time, to join new parties until August 9, 1988. Rather than taking advantage of these opportunities, plaintiffs waited until they had expired and then moved for another extension of time to join new parties – a motion the district court denied. Now plaintiffs appeal the district court's denial of their September 9, 1988 Motion for Leave to File a Second Amended Complaint or in the Alternative Motion for Joinder of Persons Needed for Just Adjudication. We will not oblige and, accordingly, we affirm the district court's denial of that motion.

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[35] The district court should examine several factors to determine whether to allow an amendment under Rule 15. *See Earlie v. Jacobs,* 745 F.2d 342, 345 (5th Cir.1984). The court should consider whether allowing the amendment would cause undue prejudice to the nonmovants, undue delay in the proceedings and whether the movants are acting in bad faith. *Id.* (citations omitted).

D

Plaintiffs also allege that the district court dismissed IDL as a party solely as a Rule 11 sanction to punish them for filing an allegedly frivolous claim. More specifically, plaintiffs assert that the district court's dismissal of IDL is (i) a mistake of law and (ii) in contempt of this court's mandate to reinstate IDL as a defendant.

1

Plaintiffs contend that this court, in deciding plaintiffs' previous appeal, implicitly recognized that the case now before us is not frivolous.[36] They are wrong. The appeal plaintiffs previously brought before us was from the district court's order dismissing IDL for lack of personal jurisdiction. The panel opinion did not consider, examine, or rule on the merits of the overall case. Accordingly, we do not find that our previous opinion is persuasive authority in opposition to defendants' motions for summary judgment.

2

Plaintiffs also assert that the district court's dismissal of IDL as a party is in contempt of this court's mandate to reinstate IDL as a defendant. We disagree. The only debatable issue is whether IDL should be reinstated as a defendant to plaintiff Topalian's claims – an issue incidental to our consideration of the merits of plaintiffs'

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[36] See *Topalian v. Ehrman*, 899 F.2d 12 (5th Cir.1990) (unpublished).

overall action.[37] Finding that plaintiffs have not even proximately approached meeting their summary judgment burden,[38] we find that the district court properly granted summary judgment against them.

E

Another issue raised by plaintiffs is whether, should this court decide to reverse the district court's summary judgment against plaintiffs, there is sufficient evidence in the record to justify reassignment of this case to another

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[37] On March 13, 1990, this court dismissed the IDL appeal as to all plaintiffs except plaintiff Topalian – the only party properly specified in the notice of appeal. The case was remanded to the district court for reconsideration of Topalian's claims against IDL. *See Topalian v. Ehrman*, 899 F.2d 12 (5th Cir.1990) (unpublished). On August 6, 1990, the district court entered an order dismissing Topalian's claims against IDL as a sanction and imposed monetary sanctions against plaintiffs' counsel, Armando Lopez, and against three of the plaintiffs. On November 30, 1990, plaintiffs' counsel filed a notice of appeal (on his own behalf, on Topalian's behalf, on the three sanctioned plaintiffs' behalf, and on behalf of another plaintiff, Garcia-Quiroga). This notice stated that the appeal was taken from the August 10, 1990 order and an order which had been entered on November 7, 1990, denying a motion for reconsideration and an oral request for entry of a Rule 58 judgment. On April 3, 1991, that appeal docketed as No. 90-2806, was dismissed for lack of a Rule 58 judgment. On June 27, 1991, the district court entered a Rule 58 judgment and, on July 18, 1991, plaintiffs' counsel filed another notice of appeal. That appeal was docketed as No. 91-2818 and is presently pending before the court.

[38] *See supra* Parts II.A-B.1.

district court judge. We find no grounds for reversal and, therefore, we do not reach this issue.

F

The final matter before us is whether we should grant defendant Rockwood's request for sanctions pursuant to Rule 38 of the Federal Rules of Appellate Procedure. Under Rule 38, this court may impose sanctions upon parties who pursue frivolous appeals. *See Coghlan v. Starkey*, 852 F.2d 806, 810-11 (5th Cir.1988). A frivolous appeal is one "that relies on legal points that are not arguable on the merits." *Lyons v. Sheetz*, 834 F.2d 493, 496 (5th Cir.1987) (citation omitted); *see also McAfee v. Fifth Circuit Judges*, 884 F.2d 221, 223 (5th Cir.1989), *cert. denied*, 493 U.S. 1083, 110 S.Ct. 1141, 107 L.Ed.2d 1046 (1990). We find that, although plaintiffs have not met the evidentiary burden required to sustain defendants' motions for summary judgment, we cannot summarily dismiss the issues they have brought before us as "frivolous." Accordingly, we deny defendant Rockwood's request for sanctions.

III

For the foregoing reasons, we AFFIRM.

APPENDIX

I. Claims Against All Defendants:

A. Section 17(a) Claims:	Evidence presented shows that plaintiffs signed documents

	necessary to subscribe to units, and that documents warn investors of "high degree" of risk; each investor was sent "offer of rescission"; plaintiffs' claims under section 12(2) of the 1933 Act are time-barred; the section 12(1) claims are clearly time-barred by the one-year statute of limitations.
B. 10b-5 Claims:	Since the tolling period for plaintiffs' claims commenced by May 1, 1985 at the latest, and the appropriate limitations period for section 10b-5 claims in Texas was two years, plaintiffs' claims are time barred.
C. "§ 55t" Claims:	District court found that no such statute exists.
D. RICO Claims:	Since Robert B. Eckis, Jr., was not listed as a defendant in response to Question 2 of the district

court's RICO standing order, the RICO claims against him were dismissed.

II. Defendants' Motions:

A. John Ehrman and EIG: "The summary judgment evidence shows that the efforts expended by the Defendants were all legitimate business practice. . . . [T]he evidence already of record, presented by other Defendants, or by Ehrman with the motion, shows no evidence of illegality or factual dispute." Order at 15.

B. Roderick Johnson: "Plaintiffs have admitted that they know of no wrongdoing by Johnson, Johnson did not sell them securities. In fact, Johnson had nothing to do with their decision to purchase these securities. The Court has made an exhaustive review of all the evidence. This has

revealed that Plaintiffs did not read either offering memorandum in any depth and had no knowledge of Johnson's role in the partnership." Order at 17.

C. Rio Bravo & Bert Gamble: "The evidence shows that Rio Bravo and Mr. Gamble had no contact with Onshore other than the two agreements. . . . The Court has reviewed the documents presented by Rio Bravo. There is no evidence of wrongdoing." Order at 19-21.

D. HPC & Richard O'Donnell: "Defendants' evidence shows that none of the Plaintiffs believed HPC did anything with Onshore investors, let alone anything wrong. Plaintiffs' response again is only full of contentions that at trial they will prove their claims." Order at 22.

E.	Rockwood:	(1) "Nowhere in the Complaint or the RICO response is it alleged that Rockwood made any affirmative misrepresentations or engaged in any predicate RICO acts. . . . Based upon the evidence presented, Rockwood contends that there is no evidence to show that Rockwood engaged in any RICO acts, made any misrepresentations to Plaintiffs[,] or was involved in any way with the sale of the units of Onshore." Order at 23. (2) "The promissory notes signed by the Plaintiffs were assigned to Rockwood. . . . Rockwood is entitled to judgment as a matter of law on this contractual claim regardless of any ruling on Rockwood's motion for summary judgment on the claims

against it, because the claims against Rockwood do not arise out of the Indemnification Agreement. . . . Therefore, Rockwood is entitled to judgment as a matter of law on the separate and independent ground of recovery based on the promissory notes." Order at 24-25.

F. Robert E. Eckis, Jr.: "In short, the Plaintiffs have asserted no knowledge of Mr. Eckis' involvement in any aspect of Onshore, and Mr. Lopez's response presents no factual dispute which could preclude summary judgment for this defendant." Order at 29.

G. Joel A. Middlebrook: "Mr. Lopez has not responded to this motion although it has been on file for almost two months. Since the motion is unopposed, and the

Court has not found any facts to show Middlebrook's liability, Middlebrook's motion shall be granted on the merits as to all claims." Order at 29.

APPENDIX B

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

April 28, 1992

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Nos. 90-2104, 90-2105, & 90-2016 – Topalian, et al. v. Ehrman, et al.

The Court has directed that the opinion entered in the above referenced causes on March 6, 1992 be corrected as indicated on the attached sheet.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By: /s/ Dawn Eiserloh
Deputy Clerk

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* * *

In dealing with plaintiffs' section 12 claims, the district court applied the one- and three-year limitations periods prescribed for those actions.[] The same reasoning and the same undisputed evidence establishes that plaintiffs' 10b-5 claims are barred by the one- and three-year statute recognized in *Lampf*. Moreover, without the benefit of *Lampf*, the district judge applied a two-year statute to plaintiffs' Rule 10b-5 claims.[] If plaintiffs' claims were barred by a two-year statute of limitations, they are necessarily barred by the one-year statute of

limitations recognized in *Lampf*. Accordingly, we affirm the district court's finding that plaintiffs' section 10(b) and Rule 10(b)(5) claims are time-barred.*

*On the eve of releasing this opinion, we learned that the Securities Exchange Act of 1934 § 27A, 15 U.S.C. § 78(aa), S. 543, P.L. 102-242, December 19, 1991 (emphasis added), was amended to provide as follows:

> (a) EFFECT ON PENDING CAUSES OF ACTION – The limitation period for any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.
>
> (b) EFFECT ON DISMISSED CAUSES OF ACTION – Any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991 –
>
> (1) which was dismissed as time barred *subsequent to June 19, 1991*, and
>
> (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.
>
> shall be reinstated on motion by the plaintiff not later than 60 days after the date of enactment of this section.

In the present case, the claims brought under the 1934 Securities and Exchange Act were dismissed by the district court in 1990 – that is, prior to *Lampf*, ___ U.S. at ___,

111 S. Ct. at 2773, and prior to this amendment's June 19, 1991 trigger date. Accordingly, we find that the amendment does not resurrect the plaintiff's claims.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MICHAEL K. TOPALIAN, et al., Plaintiffs	§	
VS.	§	CIVIL ACTION NO. H-87-3826
JOHN N. EHRMAN, et al., Defendants.	§	(Filed Oct. 6, 1989)

MEMORANDUM AND ORDER:

Pending are various Defendants' motions to dismiss or for summary judgment, and Plaintiffs' motion for summary judgment. The Defendants' motions to dismiss need not be addressed because the Court shall grant the summary judgment motions on their merits.

Defendants John N. Ehrman and Ehrman Investment Group, Inc. ("Ehrman"); Rockwood Insurance Company ("Rockwood"); Rio Bravo Oil Company and Bert Gamble ("Rio Bravo"); Houston Petroleum Company and Richard O'Donnell ("HPC"); and Roderick Johnson, filed their motions by June 15, 1989, as ordered by the Court. Plaintiffs did not file a timely response to any of these motions. At the July 28, 1989 hearing, the Court heard argument concerning the responses filed on July 27 and 28, 1989. The Court indicated that it would look at the responses, bearing in mind they were filed late. The Court then held that any other Defendant could file a motion for summary judgment by August 4, 1989, and Plaintiffs could respond by August 11, 1989. In response,

Defendants, Joel A. Middlebrook and Robert E. Eckis, Jr. filed motions to dismiss and/or for summary judgment. Plaintiffs filed a response to Mr. Eckis's motion late, on August 14, 1989. In addition, without leave of court, on August 5, 1989 Plaintiffs filed their motion for summary judgment against Ehrman and Johnson, only, and Ehrman and Johnson have responded. At the August 28, 1989 docket call, Russek and his company were granted leave to file their motion for summary judgment. Plaintiffs were advised that their motion for summary judgment would be taken under advisement until the Defendants' motions were ruled upon. There are also outstanding motions for sanctions.

The Court has reviewed the extensive pleadings, depositions, and other evidence on file. All the issues have been fully briefed. There appear to be no material fact issues in dispute, and summary judgment should be granted to these Defendants.

Statement of the Case

Plaintiffs are fifteen of seventy-seven investors in the limited partnership. This action was brought by these fifteen Plaintiffs against twenty-three Defendants on December 3, 1987 seeking damages under Sections 12(1) and 12(2) and 17 of the Securities Act of 1933, as amended [15 U.S.C. §§ 77 1(1) and (2), 77o, and 77q(a)]; § 10(b) of the Securities Exchange Act of 1934, as amended [(15 U.S.C. § 78(g)] and Rule 10b-5 thereunder (17 C.F.R. § 240.10b-5); the Racketeer Influenced and Corrupt Organization Act, the "RICO Act" [18 U.S.C. § 1964(c)]; the Texas Securities Act (Tex. Rev. Civ. Stat. Ann., art. 581-33,

Vern. Supp. 1987); and for common law fraud and deceit, breach of fiduciary duty and "other conduct alleged to be in violation of the laws of the State of Texas." Not all Defendants are alleged to have violated each of these statutes.

The Plaintiffs allege that their damages arose from the offer and sale to them of limited partnership interests ("Units") in Onshore Exploration Ltd., 1984 Mid-Year Drilling Program, a Texas oil and gas limited partnership ("Onshore") during 1984 and 1985, (with the exception of plaintiff Charles F. LaCelle who purchased his Unit from another investor in January, 1986). The Plaintiffs allege a conspiracy participated in by all of the Defendants beginning with various acts alleged to have been committed prior to the sale of the Units as well as other developments which occurred long after the sales of the Units were completed.

Included among the original Defendants are Wayne M. Byles who was the general partner of Onshore until December, 1984, and his firm M.B.A. Investment, Inc.; W. Roderick Johnson, a lawyer, and his professional corporation, W. Roderick Johnson, P.C. ("Johnson"); and Ehrman Investment Group, Inc. ("EIG"), a Texas corporation, and its president, John N. Ehrman ("Ehrman"). Johnson and EIG became general partners of Onshore after Byles resigned. Also named as Defendants are Joel A. Middlebrook ("Middlebrook"), an accountant; Victor B. Russek ("Russek"), a geologist, and his company, Russek Co.; Rockwood Insurance Co. ("Rockwood"), a firm that issued investor bonds insuring the payment of the promissory notes executed by investors; Robert B. Eckis, Jr. ("Eckis"), individually, and in his representative capacity

as attorney-in-fact for Rockwood; Interdiscount Ltd. and its officers and agents, Tara Cole and Gideon Chern ("Interdiscount"); and four oil operators: Houston Petroleum Company ("HPC"), and its president, Richard O'Donnell; Rio Bravo Oil Company ("Rio Bravo"), and its president, Bert Gamble; Kelly Onshore Drilling Co., Inc. ("Kelly Onshore"), and its president, Lawrence Kelly; and Panterra Petroleum Co. ("Panterra") and H. Louis Lee and Roger E. Casey, who are named as "agent representatives" of Panterra. Louis Carlisle, Lawrence Kelly, Jr., Kelly Onshore Drilling Co., Inc., H. Louis Lee, Roger E. Casey, Panterra Petroleum Company, Gideon Chern and Tara K. Cole have not been served with process and have not entered their appearance in this case. The parties who have not been served are DISMISSED. Fed. R. Civ. P. 4(j). Interdiscount was dismissed for lack of jurisdiction. Wayne M. Byles and his firm M.B.A. Investment, Inc. were dismissed with prejudice August 23, 1989.

Three of the Plaintiffs, Bobby W. McDonald, Richard H. Manuel and Roy Jacobs, Jr., were officers and directors of Defendant EIG during the time some of the violations are alleged to have occurred. McDonald, a certified public accountant, functioned as EIG's controller during 1985, and Manuel was employed by EIG as a salesman in 1984 and again from October, 1985 to approximately the end of 1986. Manuel and McDonald near the end of 1986 got into a dispute with Ehrman and EIG over back salaries and fees and subsequently filed and sent complaints and grievances against Ehrman and EIG with the Texas Department of Labor and Standards, the I.R.S., the Texas Employment Commission, the Worthless Check Division

of the Harris County District Attorney's Office, Congressman Joe Barton, the State Bar of Texas, and possibly the Securities and Exchange Commission and the F.B.I.

The Plaintiffs claim that they were induced to buy the Units by means of manipulative and fraudulent activities, including misrepresentations of material facts and by the omission of certain material facts necessary to make the statements that were made not misleading. They claim that these misrepresentations and omissions were made not only in oral statements, principally concerning the drilling prospects and the value of the Units, but also in the two private placement memoranda (the "Memoranda") and in correspondence and other written documents.

A certificate of limited partnership for Onshore was filed with the Secretary of the State of Texas on September 25, 1984. Onshore was formed for the purpose of raising funds for and engaging in an oil and gas drilling program. Byles, who was the sole general partner of Onshore at the time of its formation, resigned in December, 1984, and was replaced as general partner by Johnson and EIG.

Onshore entered into oil and gas drilling agreements with Defendants HPC, Rio Bravo and Kelly Onshore. Pursuant to these agreements, a total of seventeen wells were drilled of which ten wells were commercial producers. Several payments of dividends were made to investors before the wells and their production were assigned to Rockwood to pay for the amount due on the investor notes.

Onshore began its solicitation of investments in November, 1984 and employed a private placement memorandum (the "Memorandum") dated September 30, 1984 which represented Byles was its general partner. Onshore thereafter updated the Memorandum dated November 30, 1984 to reflect that Johnson and EIG were its general partners. Offers and sales of the Units by Onshore were made in October, November and December, 1984 and in January, 1985. The November 30, 1984 Memorandum stated that the offering termination date was December 31, 1984. In January, 1985 Onshore forwarded a document to each investor who had subscribed on or before December 31, 1984 which permitted each subscriber to rescind his respective purchase of a Unit(s) or to re-affirm the purchase. Any investor who subscribed to a Unit prior to December 31, 1984 and who did not elect to affirm his earlier subscription had his subscription cancelled.

A purchase of a Unit by one of the Plaintiffs, Charles F. LaCelle ("LaCelle") occurred on January 26, 1986. LaCelle purchased this Unit not from Onshore, but from another investor, Mary Barrow.

The offering of Units was made primarily to accredited investors pursuant to Rule 506 of Regulation D (17 C.F.R. Sec. 230.506) promulgated by the Securities and Exchange Commission. Offerings made pursuant to Regulation D are exempt from the registration requirements of Section 5 of the Securities Act of 1933, as amended (15 U.S.C. § 77e). Offerings made pursuant to Rule 506 are also exempt from the registration requirements of the Texas Securities Act (Tex. Rev. Civ. Stat. Ann., Art. 581). Regulation D permits the offering to be made to not more

than 35 non-accredited investors and does not limit the number of offers and sales to accredited investors.

An investor could subscribe to a Unit by either paying cash or by executing a promissory note for the full amount of his subscription. Sales of the Units were made to a total of 77 investors, including fourteen of the fifteen Plaintiffs. Six of the Plaintiffs have defaulted in the payment of the promissory notes which they executed in connection with their respective subscription to Units.

EIG, which guaranteed the payment of the loan made to Onshore by Interdiscount, has been sued by Rockwood as a result of the default by several investors, including six Plaintiffs, in paying the amount due on the promissory notes executed at the time of their respective subscription to the Units. EIG and Onshore have filed a counterclaim in this action seeking payment of the amount due on said notes from the said six Plaintiffs.

Defendant Rockwood Insurance Company has filed a counterclaim against seven of the Plaintiffs seeking a money judgment based on promissory notes and indemnification agreements signed by those seven Plaintiffs in connection with their investment in Onshore.

EIG and Onshore have also filed a counterclaim against Plaintiff Warren Fienga ("Fienga") who defaulted in the payment of a cash call when he stopped payment of his check to Onshore dated April 7, 1986 in the amount of $8,000.00.

The Defendants deny the allegations and allege that even if the facts alleged were true, the Plaintiffs' causes of action are barred by the one and three-year statutes of

limitation applicable to claims under the Securities Act of 1933 and the two-year statute of limitation applicable to claims under the Securities Exchange Act of 1934, and that Plaintiffs have failed to state a claim under the RICO Act. Some of the Defendants deny participating in the offer and sale of the Units and deny that they had any fiduciary or other duties toward any of the Plaintiffs. Johnson denies any personal contact or communication with any of the Plaintiffs regarding the sale of any of the Units.

Rio Bravo's only connection with Onshore is a contractual relationship. On or about December 17, 1984, Onshore and Rio Bravo entered into two letter agreements and operating agreements covering drilling on the Southeast Cuero and Sheriff Prospects. Rio Bravo Oil Company drilled these wells in accordance with the terms of the respective agreements. Onshore has paid some but not all of the amount owed under the agreements.

Houston Petroleum Company's only connection with Onshore is a contractual relationship. Onshore and HPC entered into agreements permitting Onshore to invest in wells to be drilled by HPC. HPC drilled several wells in which Onshore invested. Many of these were or are producing oil wells.

The only involvement of Rockwood Insurance Company with Onshore was the issuance of investor bonds for the limited partners of Onshore. The bonds were a form of insurance in the event of nonpayment of the promissory notes executed by the Onshore investors.

After most of the Onshore investors failed to make payments on their promissory notes, Rockwood paid $2,716,459.19 to CrossLand Federal Savings Bank, who held the promissory notes. Rockwood had no involvement in the sale of limited partnership interests in Onshore and had no contact with any of the limited partners.

Defendant Middlebrook worked with EIG and Ehrman. There are no meaningful allegations made as to her involvement.

Summary Judgment

Summary judgment is authorized if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56, Fed. R. Civ. P. The United States Supreme Court has interpreted this rule to mandate the entry of summary judgment after an adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

Claims Against All Defendants

A. Individual Plaintiffs

Charles F. LaCelle purchased his unit from another investor. He never saw or took the time to read the Onshore private placement memorandum.

Dr. Richard Mikles subscribed to his Onshore Units on January 10, 1985. On September 25, 1985, he assigned

his Units to Larry Stephenson (not a party); the General Partners, EIG and Johnson, consented to the assignment. Dr. Mikles and the general partners also executed a mutual and general release of one another from all liability in relation to Dr. Mikles ownership of Onshore Units.

Mr. Jack E. Burroughs filed for bankruptcy in 1985 and was discharged on October 16, 1985. Any interest in or rights accruing to Mr. Burroughs as a result of his involvement with Onshore were transferred to the trustee or referee in the bankruptcy proceeding. Plaintiff's responses, filed late, do not mention these Defendants; accordingly the Court holds that the motions for summary judgment, so far as these Defendants are concerned, are unopposed. These Defendants have no standing to claim that any of the Defendants herein made any misrepresentations to them and their claims against all the Defendants are DISMISSED. For convenience, LaCelle will not be considered as one of "the Plaintiffs" below.

B. Section 17(a) Claims

Plaintiffs' claims under Section 17(a) of the 1933 Act have already been dismissed. C. Sections 12(1) and 12(2) Claims.

A principal contention of the Plaintiff is that they were assured at the time of their purchase that distributions from oil and gas well production would be sufficient to pay off the promissory notes executed in connection with the purchase of the Onshore Units.

The evidence presented clearly shows that the Plaintiff signed the documents necessary to subscribe to their units, and acknowledged receipt of both offering memoranda on or before May 1, 1985. Before May 1, 1985 they all signed the second memorandum affirmatively electing to retain ownership of their Onshore Unit(s). The subscription agreement, signed by the Plaintiffs states, in pertinent part,

> 3.(a) [The Investor warrants that he] (i) has adequate means of providing for his current needs . . . and he has no need for liquidity of his investment . . . (ii) with respect to each One (1) Unit subscribed, (1) has a net worth of at least $200,000 . . . and can bear the economic risk of losing his entire investment herein, and (iii) has . . . such knowledge and experience in financial matters that he is is [sic] capable of evaluating the relative risks and merits of this investment.
>
> 3.(d) He has received and read or reviewed . . . and is familiar with, the Partnership Agreement, the Memorandum, and this Agreement. . . .
>
> 3.(1) That the Partnership has no significant financial or operating history; this is the Partnership's first venture and the Units are speculative investments which involve a high degree of risk of loss by him of his entire investment in the Partnership.

According to the Plaintiffs' complaint, one of the significant differences between the two memoranda complaint, is the change in the general partner from Byles to Johnson

and EIG. There are also significant similarities. Both documents warn the investor of the "high degree of risk" and both state,

> DISTRIBUTION TO LIMITED PARTNERS
>
> No distributions will be made to Limited Partners until the Partnership has funds that the General Partner determines are not needed for the operations of the Partnership, and, accordingly, there is no assurance that any distributions will will [sic] be made to the limited partners.

No Plaintiff objected to the General Partner exchange. Further, along with the second memorandum, each investor was sent an "offer of recision." The investor was required to affirmatively elect to maintain ownership of his unit(s). Each Plaintiff elected not [sic] return his unit to Onshore. This evidence is not refuted by the Plaintiffs. The Plaintiffs do not deny signing any of the documents. What they do deny is that they *read* any of the documents either before or after signing them.

> No action shall be maintained to enforce any liability created under . . . section 12(2) [15 U.S.C. § 771(2)] unless brought within one year after the discovery of the untrue statement or the omission, or after the discovery should have been made by the exercise of due diligence, or if the action is to enforce a liability created under section 12(1) [15 U.S.C. § 771(1)], unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under . . . section 12(2) [15 U.S.C. § 771(2)] more than three years after the sale.

15 U.S.C. § 77m. The Plaintiffs purchased their interests on or before May 1, 1985, but did not bring suit to challenge the allegedly unlawful and misleading sale of unregistered securities until December 3, 1987. Therefore the Plaintiffs' claims under 12(2) of the 1933 Act are time barred. *Corwin v. Marney, Orton Investments,* 788 F.2d 1063, 1066 (5th Cir. 1986).

All the Plaintiffs except Steubling, LaCelle, Mikles and MJM purchased their units on or before November 30, 1984. Their Section 12(2) claims are barred by the three-year statute of limitations. 15 U.S.C. § 77m. The Section 12(1) claims are clearly time barred by the one-year statute of limitations. 15 U.S.C. § 77m.

D. 10b-5 Claims.

Plaintiffs have alleged violations of Section 10(b) and Rule 10b-5 (the 10b-5 claims) of the Securities and Exchange Act of 1934. "This circuit [eight] years ago determined that the appropriate limitations period for 10b-5 claims in Texas was two years." Corwin, *id.* at 1067, *citing Wood v. Combustion Engineering, Inc.,* 643 F.2d 339, 341-46 (5th Cir. 1981). The tolling period for Plaintiffs' claims commenced by May 1, 1985 at the latest. Therefore, their 10b-5 claims are time barred.

E. "§ 55t" Claims

Plaintiffs allege a claim under 15 U.S.C. § 55t. There is no such statute.

F. Plaintiffs' Response

Plaintiffs' counsel, Mr. Lopez, has filed his responses late, if at all, to the various motions for summary judgment. He has supplied the Court with many pages to read, but no facts to throw into material dispute.

Mr. Lopez has a skewed version of the law. He states, "In essence, the Ehrman Defendants assert that Plaintiffs should not be allowed to seek redress for the damages they suffered for relying on the fraudulent and deceitful misrepresentations of [Ehrman] because they should have read the Offering Memorandum." This statement is patently ridiculous. The Plaintiffs allege Ehrman induced them to purchase units and sign promissory notes by telling them the limited partnership distribution would be more than enough to pay the note and give the plaintiffs a substantial profit. In other words, the Plaintiffs are alleging that they were told that if they signed these documents, they would never have to pay any money, and they would make a lot of money. The offering memorandum clearly states that the investors might never see a penny of their investment and might never make a profit. The promissory notes clearly state that the signer is responsible for the debt. It is well settled law that an adult is responsible for reading the documents he signs.

Mr. Lopez has presented no argument or support to refute the limitations problems. Nor has he supplied the Court with any argument or facts to preclude the Court from granting summary judgment on these claims. Therefore, all Plaintiffs' claims as above set out are DISMISSED as to all Defendants.

G. RICO Claims

The Plaintiffs have also alleged claims under RICO. 18 U.S.C. 1962 et seq. Question Number 2 of the Court's RICO Standing Order requires Plaintiffs to name all the Defendants they allege are liable for RICO violations. Robert B. Eckis, Jr. is not listed as such a Defendant. Therefore, any RICO claims Plaintiffs have attempted to allege against Eckis are DISMISSED. The other Defendants have been named and their motions for summary judgment shall be discussed below.

The Defendants' Motions

A. John N. Ehrman and Ehrman Investment Group (Ehrman)

Ehrman's motion for summary judgment on the RICO claims contends that Plaintiffs have failed to state a claim under RICO.

The summary judgment evidence shows that the efforts expended by the Defendants were all legitimate business practice. Ehrman and the other Defendants entered into agreements for the partnership to participate in drilling programs. Financing was arranged. Units were offered and sold to the Plaintiffs and other investors. Wells were drilled, some produced oil or gas and the Partnership was paid its share of money due. The Offering Memorandum and other documents state how the money would be paid out of funds received. This is normal business practice. There is no evidence of illegality.

In response, Plaintiffs are obliged to present evidence to show that there are facts in dispute. *Celotex, supra.* Mr. Lopez responded late and did not respond at all to the portion of the motion dealing with the RICO claims. The evidence already of record, presented by other Defendants, or by Ehrman with the motion, shows no evidence of illegality or factual dispute. The Court finds that Plaintiffs have failed to state a claim under RICO against the Ehrman Defendants.

The Ehrman Defendants also requested summary judgment on their claims against several Plaintiffs on their unpaid promissory notes and cash calls. The evidence shows that the named Plaintiffs signed the notes and have not paid. Included in the evidence is deposition testimony, copies of signed notes, and unanswered interrogatories or requests for admissions from Defendants to the Plaintiffs. Clearly, Mr. Lopez was dilatory in not responding to the discovery requests.

In response, Mr. Lopez states, inter alia,

> The Ehrman Defendants' contention that there is no genuine issue of any material fact with regard to the issue of Plaintiffs' liability for the Notes and with regard to the issue of who, if anyone, is the holder in due course of these Notes, is an outrageous and untruthful statement. . . .
>
> Defendants are spearheading [this litigation and] have apparently decided that the only way to escape liability is by burdening Plaintiff's counsel with an abundance of non-meritorious motions. . . .

> Factual issues abound with respect to every issue in this case. etc. etc.

Mr. Lopez is obviously not aware of the law in regard to responding to a motion for summary judgment. If "factual issues abound," this was the time to present them, with supporting documentation, to this Court. *Celotex, supra*. Mr. Lopez has failed to present more than unsubstantiated allegations and whining. He does not cite one case or present one piece of evidence in support of his position. Therefore, the Court shall grant summary judgment to these Defendants on their claims against the named Plaintiffs.

B. Roderick Johnson and W. Roderick Johnson, P.C. (Johnson)

Johnson contends that he is entitled to summary judgment because after two years of discovery, there is no evidence to show that he engaged in whatever wrongdoing the Plaintiffs have attempted to allege in their first amended complaint and response to the RICO Order. Among Johnson's complaints about the failure of Plaintiffs' allegations are 1) the complaint does not comply with Rule 8 because it rambles and is impossible to read coherently; 2) the averments of fraud have not been stated with particularity, in violation of Rule 9(h); and 3) in their response to the RICO order, Plaintiffs failed to allege specific facts in support of their claims. Johnson contends that since Plaintiffs failed to respond to requests for admissions within the required 30 days, the requests are deemed admitted. Therefore, Plaintiffs have admitted that they know of no wrongdoing by Johnson, Johnson

did not sell them securities. In fact, Johnson had nothing to do with their decision to purchase these securities.

The Court has made an exhaustive review of all the evidence. This has revealed that Plaintiffs did not read either offering memorandum in any depth and had no knowledge of Johnson's role in the partnership.

Mr. Lopez filed his response to this motion late. The Court was initially grateful to observe that it was so short. The delight was short lived, however. Mr. Lopez again failed to respond adequately. Mr. Lopez first contends that Johnson gave the Plaintiffs an extension of time in which to respond to the requests for admission. He does not state the length of the extension, and there is no proof of this agreement. Further, Johnson, in his reply to the response, denies any agreement. Next, Mr. Lopez complains that although the same requests were made of each Plaintiff, the requests were "scrambled so that Plaintiffs' counsel would have to respond to each request individually." Mr. Lopez states that the purpose of this tactic was to unduly burden him with paperwork.

Mr. Lopez filed this lawsuit. He can not now be heard to complain that the Defendants choose to defend themselves. Requests for admission are a normal part of discovery. The requests were for admissions of fact known only to each individual Plaintiff, not to counsel. The Court is at a loss as to why Mr. Lopez would even attempt to respond to these requests. Further, a review of the responses, filed late, shows that the Plaintiffs did not even begin to reply until well after the 30-day limit for response had passed. Mr. Lopez's complaints have no merit.

Mr. Lopez next contends that Johnson was the attorney for the investors and thus had some sort of fiduciary duty. Mr. Lopez has produced no supporting evidence. If this is an essential element of Plaintiffs' case, they are obliged to submit proof in response to a motion for summary judgment. *Celotex, supra.*

Mr. Lopez contends there is "no question that the Johnson Defendants participated in the fraudulent sale of securities." Mr. Lopez has presented no evidence of a fraudulent sale of securities or that Johnson participated. This contention fails.

Then Mr. Lopez rambles on for three pages about the Ehrman Defendants' alleged wrongful conduct which should be imputed to Johnson. In support of this response, Mr. Lopez submits one of Ehrman's affidavits which proves, inter alia, that Johnson was one of the General Partners for Onshore. This fact is undisputed. It is not evidence of fraud or wrongdoing. The second Offering Memorandum clearly states that Johnson is a General Partner. The Plaintiffs have admitted that they either did not read or did not attempt to understand the memorandum, and they did not know or care that Johnson was a General Partner of Onshore. Even though Mr. Lopez has submitted several copies of this affidavit, it's [sic] significance has never been explained.

After a careful review of the motions, the responses, the replies, and all the evidence, and after several attempts to read and understand the Complaint and the RICO Order, the Court is convinced that there are no

material fact issues in dispute as to Johnson's involvement with Onshore. Johnson, like the others, is entitled to judgment as a matter of law.

B. Rio Bravo and Bert Gamble

Rio Bravo is an oil and gas operator and Bert Gamble is its president. Victor Russek is an independent oil and gas geologist who Rio Bravo has used on several occasions to screen and recommend oil and gas prospects and find participants for its drilling programs. Rio Bravo decides where to drill. It then seeks participants to help fund the drilling operations. Russek introduced Rio Bravo to Onshore as a potential participant in one of Rio Bravo's drilling programs. Rio Bravo entered into two agreements with Onshore whereby Onshore became one of several participants in two of Rio Bravos drilling programs. Rio Bravo has presented the agreements and the affidavit of Mr. Gamble. The evidence shows that Rio Bravo and Mr. Gamble had no contact with Onshore other than the two agreements. Neither owned any interest in Onshore and had no knowledge of, or contact with, the Onshore investors. Onshore was merely one of several passive "non-operator" participants in Rio Bravo's programs. Further, the deposition excerpts show that none of the Plaintiffs had any knowledge of Rio Bravo before they purchased their units and knew of no misrepresentations or fraud committed by these Defendants.

Once the moving party has shown that there is an absence of evidence to support the non-moving party's case, the burden shifts to the non-movants "to go beyond the pleadings and by [their] own [evidence] designate

'specific facts showing that there is a genuine issue for trial.' " *Celotex, supra* at 324; Fed. R. Civ. P. Rule 56(e).

Plaintiffs' response was filed late and for this reason alone it may be disregarded. It contains one exhibit which relates to the T.E.L. investment. The Court denied Plaintiffs' motion to file their second amended complaint and struck the second amended complaint which deals with the T.E.L. investment. Accordingly, this exhibit is irrelevant. Plaintiffs' response fails to contain any other evidence of "specific facts." Instead, Plaintiffs would have the Court deny summary judgment because,

> Plaintiffs, at a minimum, *can clearly establish* that [Rio Bravo] aided and abetted. . . . Plaintiffs contend that the evidence *will establish* [their] culpability. . . . [a]t the trial on the merits, Plaintiffs *will be able to clearly show*. . . . Plaintiffs must be given the opportunity to prove. . . . To require Plaintiffs to conclusively prove these matters prior to trial is not required. However, Plaintiffs contend that they will be able to prove their case if given the opportunity.

Mr. Lopez, Plaintiffs' counsel, is functioning under a misguided view of the law. In response to a motion for summary judgment alleging no evidence has been produced to show that the movant has committed any wrong, it is incumbent upon the non-movant to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial." *Celotex*, at 322. Plaintiffs are required to respond to Defendants' motion with "specific facts showing that there is a genuine issue for

trial." *Id.* at 324 (cite omitted). Plaintiffs have not supplied the Court with any evidence to contradict the Defendants' motion. The Court has reviewed the documents presented by Rio Bravo. There is no evidence of wrongdoing. Accordingly, Rio Bravo's and Bert Gamble's motion for summary judgment shall be GRANTED on all claims.

D. Houston Petroleum Company and Richard O'Donnell

Houston Petroleum Company is an oil and gas drilling operation and O'Donnell is its President (hereafter both "HPC").

Plaintiffs have made allegations against HPC similar to those against Rio Bravo. Additionally, they allege a connection between HPC and Johnson based on alleged illegal kickbacks.

HPC has presented the affidavit of its president and deposition testimony to support its motion for summary judgment. HPC's motion and memorandum along with the undisputed evidence establish that HPC was not involved in the selling of the Onshore limited partnership interests to Plaintiffs or any other Onshore investors. HPC, like Rio Bravo, was a drilling operator. According to the subscription agreement, it is clear that HPC was not the General Partner of Onshore, and the Plaintiffs understood that HPC was not a seller of the Onshore interests. Additionally, HPC had no role in the management of Onshore and had no interest in Onshore. There is evidence that HPC issued checks to Johnson. There is no evidence of illegal kickbacks.

Plaintiffs' response was filed late and may be disregarded for that reason alone. Further, it contains only one exhibit, a rambling, stream of consciousness letter from one Defendant to another which proves nothing. HPC is mentioned in the letter but no facts can be gleaned from this exhibit. Further, the letter is not signed.

Again, as in the response to the Rio Bravo motion, Plaintiffs have failed to show specific facts which would tend to contradict the Defendants' proof. Defendants' evidence shows that none of the Plaintiffs believed HPC did anything with Onshore investors, let alone anything wrong. Plaintiffs' response again is only full of contentions that at trial they will prove their claims. Again, Mr. Lopez has failed to fulfill the Plaintiffs' burden to show specific facts. Accordingly, Defendants' motion for summary judgment on all Plaintiffs' allegations shall be GRANTED.

E. Rockwood Insurance Company

One of Rockwood's business activities is the issuance of investor bonds relating to entities such as Onshore. As Plaintiffs admit in their response to the RICO Order, Rockwood contracted with Onshore for finance related services. Rockwood issued the bonds as surety. The individual limited partner for whom the bond was issued would be designated as principal on the bond, and the entity advancing funds to the partnership would be the beneficiary of each bond. The purpose of the bonds was to provide a source of repayment for the lender if one or more of the limited partners defaulted on a promissory note executed by each limited partner to the lender, if the

terms and conditions of the bonds were otherwise met. In exchange for issuing the bonds, Rockwood received a premium from the partnership and an indemnification agreement from each limited partner.

The only RICO claims alleged against Rockwood are made under 18 U.S.C. § 1962(a), (b), (c) and (d). Nowhere in the Complaint or the RICO Response is it alleged that Rockwood made any affirmative misrepresentations or engaged in any predicate RICO acts.

In support of its motion for summary judgment Rockwood has presented the signed agreements it made with the limited partners. No Plaintiff has denied that he signed these agreements. Also, Rockwood has presented testimony showing that Rockwood had no involvement with the formation or management of Onshore and did not sell or have anything to do with the sale of Onshore units to the Plaintiffs or any of the investors. Rockwood owned no interests in Onshore.

Based upon the evidence presented, Rockwood contends that there is no evidence to show that Rockwood engaged in any RICO acts, made any misrepresentations to Plaintiffs or was involved in any way with the sale of the units of Onshore. Therefore, Defendants are entitled to summary judgment.

Rockwood also seeks judgment as a matter of law on its counterclaims against Plaintiffs Michael K. Topalian, Charles W. Anderson, Richard H. Manual, Bobby MacDonald, Jack E. Burroughs, Don W. Boyett, and MJM Ventures.

The declaration of Philip S. Kift establishes that among the amounts paid to CrossLand were payments relating to the obligations of those seven Plaintiffs to CrossLand. When payment was made, the promissory notes signed by the Plaintiffs were assigned to Rockwood. In addition, each of the Plaintiffs signed an Investor Bond Indemnification Pledge Agreement for Limited Partnership Financial Guarantee Bond upon which Rockwood relied in issuing the respective bonds. Among its own provisions, each indemnification agreement provided that the limited partner who executed the agreement,

> will protect, indemnify and save harmless [Rockwood] from and against any and all other expenses which [Rockwood] may sustain or incur under or in connection with the policy or bond issued to the Obligee or in connection with this Indemnification and Pledge Agreement, including but not limited to: (a) sums paid to the Obligee or its assigns to cure the [limited partner's] Default, under or to purchase, the [limited partner's] Note.

The Indemnification Agreement executed by each limited partner is a direct contractual relationship between Rockwood and the individual limited partner. Rockwood is entitled to judgment as a matter of law on this contractual claim regardless of any ruling on Rockwood's motion for summary judgment on the claims against it, because the claims against Rockwood do not arise out of the Indemnification Agreement. The amount of principal and interest to which Rockwood is entitled is set forth in the unsworn declaration by Philip S. Kift; and a reasonable attorney's fee to which Rockwood is entitled

is set forth in the unsworn declaration of Kevin Risley. In addition, Rockwood is now the owner and holder of the promissory notes executed by each of the seven Plaintiffs against whom Rockwood has asserted claims. The evidence establishes that Rockwood gave value for those notes and took the notes without notice of any claim or defense to the notes by any party. Therefore, Rockwood is entitled to judgment as a matter of law on the separate and independent ground of recovery based on the promissory notes.

In response, Plaintiffs' counsel, Mr. Lopez, submitted another variation of the "canned" brief he used to respond to the motions of HPC and Rio Bravo. Again, the response was submitted late. Again, there is no evidence of any specific facts to refute the Defendants' claims. Further, Mr. Lopez did not even address the part of the motion relating to Rockwood's claims against the individual Plaintiffs who have outstanding notes due to Rockwood.

Again, Mr. Lopez hopes the Court will deny the motion to dismiss. The Court has read all the evidence and therefore views all the motions as request for summary judgment. Therefore, the issue of dismissal is beside the point. Defendants have shown in their motion that there is no material issue of fact raised as to their lack of involvement in any schemes or conspiracies alleged by Plaintiffs. Defendants have shown that there is no factual dispute concerning the money the named Plaintiffs owe to Rockwood. Accordingly, Rockwood's motion for summary judgment shall be GRANTED as to all claims and counterclaims.

F. Robert E. Eckis, Jr. (Eckis)

Eckis has moved for dismissal based upon lack of personal jurisdiction. Plaintiffs asserted jurisdiction was proper under the provisions of section 27 of the Securities Exchange Act of 1934 ("the Act"). 15 U.S.C. § 78aa. It appears that the Court most likely does not have jurisdiction over Eckis. But this issue need not be ruled upon because summary judgment will be granted on the merits.

Eckis has moved for summary judgment based upon the lack of evidence showing he had any knowledge of alleged fraud by Onshore or that he had involvement in the sale of Onshore interests.

Eckis is the Chairman of the Board of Payment Plans, Inc., an underwriting manager for Rockwood. Eckis was contacted by Interdiscount, Ltd. ("IDL") to locate a bonding company for the Onshore investor bonds. Eckis contacted Rockwood, and with its agreement, Eckis issued the bonds in the name of Rockwood. Eckis was responsible for approving the individual investors to be bonded.

In December, 1984 Eckis had authority from Rockwood to issue sixty-six investor bonds relating to Onshore on which Rockwood was the surety. Attached to each bond was a power of attorney designating Eckis as attorney in fact for Rockwood. These powers of attorney expired as of December 31, 1984. The closing on the loans did not take place as scheduled. The bonds were reissued, signed by the investors and the closing on the loans was completed as scheduled in February, 1985. This appears to be a normal business practice, and no evidence to the contrary has been submitted. Further, all the investors,

including the Plaintiffs, signed several documents in connection with the loan and the bonds. Nothing appears to have been kept secret from the Plaintiffs. In fact, in their depositions, they admit their ignorance of any wrongdoing. They all state that they did not read any of the documents they received in connection with Onshore, including the ones they signed, or they scanned them, did not understand them but sought no explanation.

Eckis has shown that he was not a "seller" of the interests purchased by the Plaintiffs. The evidence shows that none of the deposed investors had any contact, with or knowledge of, Eckis before they purchased unit(s), and they did not purchase their unit(s) from Eckis. "Only a statutory 'seller' can be held liable under [15 U.S.C.] section 12 . . . " *Abell v. Potomac Insurance Co.*, 858 F.2d 1104, 1113 (5th Cir.), *reh. denied*, 863 F.2d 882 (5th Cir. 1988).

Eckis has shown that he had no control over the Onshore Limited Partnership, and thus he could not have violated Section 15 of the 1933 Act. 15 U.S.C. § 77o. None of the testimony presented indicates that Eckis had any involvement with Onshore other than providing investor bonds. Further, the claims relating to violations of section 10(b) and Rule 10b-5 were not made against Eckis as a "primary" or "aiding and abetting" party. No evidence has been presented to show Eckis had any involvement in these alleged violations.

In response to Eckis' motion, Plaintiffs have presented the "canned" brief with some additions. Although this time there are some attachments, they do not appear to contradict any facts in evidence. Nor do they put any

facts into dispute. It is not disputed that Eckis was the attorney-in-fact for Rockwood and arranged for Rockwood to provide the Onshore investor bonds. This is a normal business practice. Plaintiffs have not shown anything illegal in this practice. The fact that the investor bonds had to be re-signed is not illegal. Nor was it concealed from the Plaintiffs, who elected to sign the reissued documents. In fact, it appears that any ignorance of this fact on the part of the Plaintiffs is due to their own negligence in not reading the documents they signed.

Mr. Lopez contends in Plaintiffs' response, that even outsiders may become fiduciaries of investors. He cites *Dirks v. S.E.C.*, 463 U.S. 646, 655 (n.14 (1983). That case deals with facts so totally different from the facts here that the Court is at a loss as to why the case is cited. In *Dirks*, the facts concern an outsider's receipt of "material nonpublic information." Plaintiffs do not allege or show in the response that Mr. Eckis received any nonpublic information from Onshore insiders. Eckis received a copy of the offering memoranda and the signed investor bonds. The Plaintiffs also received this information. The fact that they chose to sign these documents without reading them does not attach liability to Mr. Eckis.

Mr. Lopez has attached an excerpt from a memorandum of law from another case in which Eckis and Rockwood were involved. Mr. Lopez states that this document shows Eckis is a witness against IDL in a suit in which Rockwood is "alleging violations by IDL of the RICO statute with regard to the bonding of the Promissory Notes for Texas Limited Partnerships." The Court has reviewed the memorandum. That case is an action for

recovery of money owed on a loan secured by a promissory note. The lawsuit was filed in New York. There is no mention of Texas and no mention of RICO violations. Obviously, this exhibit and the text alluding to it were added to the response to harass and mislead the Court, in violation of Rule 11.

In short, the Plaintiffs have asserted no knowledge of Mr. Eckis' involvement in any aspect of Onshore, and Mr. Lopez's response presents no factual dispute which could preclude summary judgment for this Defendant. Accordingly, Mr. Eckis' motion for summary judgment shall be GRANTED on all claims.

G. Joel A. Middlebrook

Middlebrook is *pro se*, thus her brief is concise. She contends that "Mr. Lopez told me . . . he did not believe I had done anything wrong. . . . [He told me] he was suing everyone who might have had anything to do with Onshore because he was not aware of who might have done anything wrong."

Mr. Lopez has not responded to this motion although it has been on file for almost two months. Since the motion is unopposed, and the Court has not found any facts to show Middlebrook's liability, Middlebrook's motion shall be GRANTED on the merits as to all claims.

Conclusion

For the reasons stated, the Court finds there is no evidence of fraud to support any of the Plaintiffs' complaints. It is, therefore

ORDERED that all Plaintiffs' federal and state claims against these Defendants are DISMISSED. It is further

ORDERED that these Defendants' motions for summary judgment are GRANTED. It is further

ORDERED that the Ehrman Defendants and Rockwood Insurance Company shall individually present forms of final judgment on or before October 20, 1989 as to their claims against the named Plaintiffs. The Order shall specifically set out the indebtedness of each named Plaintiff. It is further

ORDERED that Plaintiffs' motion for summary judgment is DENIED. It is further

ORDERED that the Court will entertain legitimate motions for sanctions. Counsel are advised to review recent Fifth Circuit case law concerning this issue.

The Court has reviewed Mr. Eckis's most recent motion concerning payment of his expenses. Mr. Lopez shall review and comply immediately with the Court's previous Order which stated, "Plaintiffs' counsel" shall pay the expenses. Eckis's motion is taken under advisement.

DONE this 4th day of October, 1989.

/s/ Norman W. Black
United States
District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MICHAEL K. TOPALIAN, et al.,	§	CIVIL
Plaintiffs	§	ACTION
	§	NO.
VS.	§	H-87-3826
JOHN N. EHRMAN, et al.,	§	
	§	
Defendants.	§	
	§	

ORDER

(Filed Dec. 21, 1989)

Pending is the motion for summary judgment submitted by Defendants Russek Co. and Victor B. Russek (Russek). There is no response from the Plaintiffs although the time for response has long since passed.

Victor Russek is president of Russek Co. Russek was employed by Ehrman Investment Group (EIG) as a consulting geologist to recommend oil and gas drilling ventures. The employment continued from November 28, 1984 to March 1, 1986. His involvement with the limited partnership investments has been adequately detailed in the Court's Order of October 4, 1989. The Court, in an abundance of caution, has again reviewed this file and finds that there is no evidence to suggest that Russek is liable for any of the claims alleged by the Plaintiffs. The Court adopts and extends its previous statements in the

October 4th Order to include Russek Co. and Victor Russek. It is accordingly,

ORDERED that the Motion for Summary Judgment of Russek Co. and Victor Russek is GRANTED. It now appears that all the Defendants in this litigation have been granted summary judgment, and the Court has signed the final judgments submitted by the Defendants. It is therefore

ORDERED THAT all Plaintiffs' claims against all the Defendants having been fully adjudicated, this case is DISMISSED.

THIS IS A FINAL JUDGMENT.

Signed this 15th day of Dec., 1989 at Houston, Texas.

/s/ Norman W. Black
NORMAN W. BLACK
UNITED STATES
DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MICHAEL K. TOPALIAN, ET AL	§	CIVIL
	§	ACTION
Plaintiffs,	§	NO.
	§	H-87-3826
VS.	§	
JOHN N. EHRMAN, ET AL	§	
	§	
Defendants.	§	

DEFENDANTS' JOINT PRETRIAL ORDER

VII.

CONTESTED ISSUES OF FACT

A. Defendants' Contested Issues of Fact

1. Whether any misrepresentation of material fact were made by any of the defendants in the offer and sale of Units to the Plaintiffs, or any of them.

2. Whether any omissions to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, were used by any of the defendants to offer and sell the Units to the Plaintiffs, or any of them.

3. Whether any of the defendants engaged in any act, practice or course of business which operated as a fraud or deceit upon any of the Plaintiffs in connection with the offer and sale of the Units.

4. Whether any of the defendants knew or in the exercise of reasonable diligence could have known of the untruths or omissions alleged in the Complaint at the time of the offer and sale of the Units to each of the plaintiffs.

5. Whether any of the Plaintiffs knew at the time of their respective purchase of the Units of the untruths or omissions allegedly used by the defendants, or any of them, in the offer and sale of the Units.

6. The respective dates that each of the plaintiffs knew or should have known that the alleged misrepresentations and omissions were not true.

7. The respective dates each of the plaintiffs discovered, or in the exercise of reasonable care, should have discovered the untruths or omissions alleged.

8. The respective dates that each of the plaintiffs received the private placement memorandums.

9. Were offers and sales of Units made to more than 35 nonaccredited investors?

10. Were offers and sales of the Units made by means of a public solicitation?

11. Whether any of the defendants participated in a conspiracy to defraud any of the plaintiffs.

12. Whether the acts alleged in the Complaint as "predicate acts" were acts performed in furtherance of a conspiracy.

13. Whether any of the acts alleged to have [sic] performed by any of the defendants were intended to defraud any of the plaintiffs.

14. Whether any of the plaintiffs in purchasing any of the Units relied on any of the acts alleged to have been performed by the defendants to defraud the plaintiffs.

15. Whether the plaintiffs have suffered any damages as a result of any illegal act on the part of any of the defendants.

16. The amounts that the plaintiffs/counter-defendants are indebted to Onshore and EIG on the promissory notes the plaintiffs/counterdefendants executed in connection with their purchase of Units, including interest and reasonable attorney's fees.

17. Whether this action was brought as part of an effort by plaintiffs McDonald and Manuel to harass and/or coerce Ehrman and EIG.

18. Whether any of the defendants engaged in any violations of the RICO Act in connection with the matters alleged by the plaintiffs.

19. Whether any of the Defendants had a fiduciary duty to any of the plaintiffs.

20. Whether any of the Defendants violated any fiduciary duty to any of the plaintiffs.

B. Rockwood's Contested Issues of Fact

1. Whether Rockwood made any misrepresentations of any of the plaintiffs?

2. If there were any violations of state or federal securities laws committed by any party, did Rockwood have knowledge of any such violations?

3. Whether Rockwood ever acquired or maintained an interest in Onshore?

4. Whether Rockwood ever conducted or participated in the operation of Onshore?

5. Whether Rockwood ever entered into an agreement to commit an act of mail fraud, wire fraud, or securities fraud?

6. What is the outstanding balance on the promissory notes signed by the seven Counter-Defendants?

7. What is the amount of payments and expenses incurred by Rockwood in connection with the issuance of investor bonds on which the Counter-Defendants are principals?

8. What is a reasonable attorney's fee for the legal services performed on behalf of Rockwood in this case?

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MICHAEL K. TOPALIAN, ET AL	*	CIVIL
	*	ACTION
Plaintiffs,	*	NO.
	*	H-87-3826
VS.	*	
	*	
JOHN N. EHRMAN, ET AL	*	
	*	
Defendants.	*	
	*	

DEFENDANTS' JOINT PRETRIAL ORDER

VI.

ADMISSIONS OF FACT

A. Defendants' Admissions of Fact.

1. Onshore is a limited partnership formed under the laws of the State of Texas.

2. EIG is a Texas corporation.

3. Defendant John N. Ehrman ("Ehrman") was President and a director of EIG at all material times.

4. Defendant Wayne M. Byles ("Byles") resigned as a general partner of Onshore in Dec. 1984.

5. W. Roderick Johnson ("Johnson") and EIG replaced Byles as general partners of Onshore.

6. The Onshore Memorandum dated September 30, 1984 represented Byles was general partner of Onshore.

7. The Onshore Memorandum dated November 30, 1984 represented that EIG and Johnson were general partners of Onshore.

8. The Plaintiffs purchased their respective Units in Onshore on the following dates:

Plaintiff	Date of Purchase
Michael K. Topalian*	November 8, 1984*
Warren Fienga	November 8, 1984
Roy Jacobs	November 3, 1984
Richard Orozco	November 29, 1984
Juan Garcia-Quiroga	October 30, 1984
Charles W. Anderson	November 29, 1984
Francis D. Covert	November 9, 1984
Richard H. Manuel	November 30, 1984
Jack E. Burroughs	November 8, 1984
Don W. Boyett	November 30, 1984
Bobby W. McDonald	November 30, 1984
Jean Steubing	January 10, 1985
Charles F. LaCelle	January 24, 1986
Richard Mikles	January 10, 1985
MJM Ventures	January 10, 1985

9. The offering of the Units was not registered with the Securities and Exchange Commission.

10. The Memorandums represented that the offering of the Units was being made pursuant to the provisions of Regulation D 1 promulgated by the Securities and Exchange Commission.

11. The November 30, 1984 Memorandum states that the offering of the Units was to terminate on December 31, 1984.

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* Michael K. Topalian purchased additional units on October 16, 1985.

12. The September 30, 1984 Memorandum was delivered to the investors who purchased their Units prior to December 30, 1984 at or before the time they subscribed to their respective Units.

13. The November 30, 1984 Memorandum was delivered before May 1, 1985 to a11 of the investors who had previously purchased Units from Onshore.

14. In January, 1985, the persons who had previously subscribed to Units. including several of the plaintiffs, were given an option by Onshore to either cancel or re-confirm their purchase of such Units.

15. The subscriptions of investors who subscribed to Units in 1984, and who elected not to re-confirm the purchase of such Units were cancelled.

16. The Units were offered to prospective investors at the subscription price of $30,000.00 each.

17. Subscribers to the Units could either pay cash for their Units or could execute a promissory note for an amount equal to the purchase price of the Units.

18. The promissory notes of subscribers to the Units were used by Onshore to secure a loan to fund its operations.

19. The plaintiffs Michael K. Topalian ("Topalian"), Warren B. Fienga ("Fienga"), Roy Jacobs, Jr. ("Jacobs"), Richard Orozco ("Orozco"), Juan Garcia-Quiroga ("Quiroga"), Francis D. Covert ("Covert"), Don W. Boyett ("Boyett"), Bobby W. McDonald ("McDonald"), Charles W. Anderson ("Anderson"), Richard H. Manuel ("Manuel") and Jack E. Burroughs ("Burroughs") were among the subscribers to the Units who executed promissory notes made payable to Onshore for the full purchase price of the respective Units to which they subscribed.

20. On or about January 31, 1985, Defendants Johnson and EIG entered into a financing agreement on behalf of Onshore to secure a loan of $4,175,000 from Defendant Interdiscount Ltd. ("Interdiscount").

21. The loan to Onshore was secured by the assignment to Interdiscount of the promissory notes executed by certain of the plaintiffs and other investors in Onshore.

22. Defendant Rockwood Insurance Company ("Rockwood") issued bonds as a form of insurance in the event of nonpayment of the promissory notes.

23. On or about February 25, 1985. Interdiscount assigned its interest in the Onshore note, the promissory notes executed by the Onshore investors and Interdiscount's rights under the Rockwood investor bonds to CrossLand Federal Savings Bank ("Cross Land"), a financial institution located in New York.

24. Several of the investors, including six of the plaintiffs, 1 defaulted in paying the amount due on the promissory notes they executed in connection with their purchase of their respective units in Onshore.

25. Rockwood paid the amount due Cross Land Savings on the promissory notes payable to Onshore which Rockwood had insured.

26. Rockwood brought suit and got judgment on April 8, 1988 for $3,428,594.94 against Onshore and EIG on the amount due on the promissory notes Rockwood had insured in connection with the funding of Onshore, plus a judgment against Ehrman in the amount of $165,336.99.

27. The assets of Onshore, including the royalties from wells in which Onshore has participated, have been assigned to Rockwood to secure payment of its judgment against Onshore.

28. That the promissory notes executed by the subscribers to the Onshore Units became due and payable in full to Cross Land Savings on October 31, 1985.

29. That on or about September 26, 1984, Onshore entered into an agreement with Defendant Houston Petroleum Company ("H.P.C.").

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MICHAEL K. TOPALIAN, ET AL.,	:	
PLAINTIFFS,	:	C.A. NO.
VS.	:	H-87-3826
JOHN N. EHRMAN, ET AL., DEFENDANTS.	:	

DEPOSITION OF JOEL A. MIDDLEBROOK
FEBRUARY 8 & 9, 1989
VOLUME II

ORIGINAL

* * *

[p. 466] A He was a lawyer with First Tech.

Q With First Tech?

A Uh-huh.

Q And, I believe, Mr. Lopez spent some time on First Tech on the first day of this deposition?

A Yes.

Q Do you recall a month or a year in your association with Onshore that you first became aware of Houston Petroleum Company?

A It would have to be in the fall of '84.

Q How about Mr. O'Donnell? The same?

A Same.

Q And what was the occasion that brought about your learning of Houston Petroleum Company?

A Well, one time I went to their office, before they started the program, and visited with them. They had several people there that showed the office and what they were going to drill, and so on. It was a kind of a dog-and-pony show for potential investors that John had set up and did.

Q Okay. And were you by yourself?

A Yes; I went by myself.

Q You did? Was anyone else at the meeting besides –
[p. 467] A Oh, yes; there were other people there.

Q Okay. Who was there?

A I don't know their names. They were just different prospective investors that showed up.

Q Okay. Was Ehrman there?

A Uh-huh.

Q Okay. Anyone else associated with Onshore?

A I don't remember. Rod might have been there; I'm not sure. He may or may not. I don't know; I don't remember. I know John was there; and a bunch of potential investors were there.

Q And who made the presentation for Houston Petroleum Company?

A One of their geologists. I don't know his name. I have forgotten his name.

Q Was he the only individual who spoke?

A No. I'm sure everybody had a little something to say.

Q Do you recall the prospect that was presented at that time?

A It was the one that was in the notebook, the prospectus.

Q You don't recall the name?

* * *

APPENDIX H

IN THE UNITED STATED DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MICHAEL K. TOPALIAN, ET AL.,	§	
	§	CIVIL
Plaintiffs	§	ACTION
	§	NO.
VS.	§	H-87-3826
JOHN N. EHRMAN, et al.,	§	
	§	
Defendants.	§	
	§	

ORDER

Pending are the various motions to compel, for protection and for sanctions of all parties. The parties have previously been ordered to complete discovery in a professional manner. It appears that the disputed matters must be set out on the record. Therefore it is

ORDERED that the Court shall conduct a hearing on all pending motions on August 18, 1989 at 10:30 a.m. At that time all counsel *and their clients* will appear. Corporate clients will present a representative with settlement authority. All individual Plaintiffs shall be present. The Court will hear sworn testimony from counsel on the facts causing the discovery disputes. It is further

ORDERED that any scheduled discovery shall continue during this time.

Signed this 7th day of June, 1989 at Houston, Texas.

/s/ Norman W. Black
NORMAN W. BLACK
UNITED STATES DISTRICT
JUDGE